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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MILVERTHA PINNICK, GUARDIAN AND NEXT FRIEND OF MANNA PINNICK AND CORTLAND PINNICK, MINORS, AND JAMES BRADY, ADMINISTRATOR OF THE ESTATE OF MELISSA PINNICK, DECEASED, PETITIONERS

v.

CORBOY & DEMETRIO, P.C., A PROFESSIONAL CORPORATION, ROBERT J. BINGLE AND G. GRANT DIXON, III, INDIVIDUALLY AND AS AGENTS OF CORBOY & DEMETRIO, P.C.,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are petitioners denied due process when one or more Justices of the Illinois Supreme Court hearing their appeal receive substantial contributions for their election campaigns directly from----and have close personal and professional ties with----the respondents, the parties opposing their appeal?

2. Do members of the Illinois judiciary hearing an appeal involving a party who makes substantial contributions to their election campaign----and with whom they have close personal and professional ties----lose, or appear to lose, their ability to decide the appeal fairly and impartially so that recusal is required as a matter of due process?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

RELEVANT PROVISIONS INVOLVED 3

STATEMENT 7

REASONS FOR GRANTING THE PETITION 22

CONCLUSION 36

APPENDIX

Illinois Supreme Court Order 1a
Motion for Recusal of Supreme Court Justices 3a
Illinois Supreme Court Denial for Leave to Appeal 14a
Illinois Appellate Court Opinion 15a
Illinois Appellate Court Order Denying Rehearing 49a

TABLE OF AUTHORITIES

Page

CASES

AETNA LIFE INS. CO. V. LAVOIE, 475 U.S. 813, 823-824(1986) 19, 26
HUGH M. CAPERTON ET AL. V. A.T. MASSEY COAL COMPANY, INC. ET AL., U.S. SUPREME COURT DOCKET NO. 08-22, DECIDED AT 556 U.S. ___; 129 S.CT. 2252(JUNE 8, 2009) ..... *passim*
CLEVELAND BOARD OF EDUCATION V. LOUDERMILL, 470 U.S. 532, 541(1985) 35
HAMDI V. RUMSFELD, 542 U.S. 507, 533(2004) 22, 35
IN RE MURCHISON, 349 U.S. 133, 136 (1955) 22
MATHEWS V. ELDRIDGE, 424 U.S. 319, 334-335(1976) 35
MILVERTHA PINNICK ET AL. V. CORBOY & DEMETRIO, P.C. ET AL., U.S. SUPREME COURT DOCKET NO. 08-1129. 557 U.S.___ 2009 US LEXIS 4751(2009) 21
MORRISSEY V. BREWER, 408 U.S. 471, 481(1972) 35
OFFUTT V. UNITED STATES, 348 U.S. 11,14(1954) 22
PERLMAN V. FIRST NAT. BANK OF CHICAGO, 331 N.E.2D 65, 65(ILL.1975) 34
PHL, INC. V. PULLMAN BANK & TRUST COMPANY ET AL., 721 N.E.2D 1119, 1120(ILL. 1999) 34
QUERCIA V. UNITED STATES, 289 U.S. 466, 470(1933) 22
TUMEY V. OHIO, 273 U.S. 510, 535(1927) 19
WARD V. MONROEVILLE, 409 U.S. 57, 60(1972) 19, 22
WITHROW V. LARKIN, 421 U.S. 35, 47(1975) 19, 22

STATUTES

28 U.S.C. § 455 4
28 U.S.C. §§ 455(a) 22, 24, 26
28 U.S.C. § 1257(a) 2, 3
42 U.S.C. § 1983 33
ILCS 5/2-1001 6

RULES

Illinois Code of Civil Procedure 735 6
Illinois Supreme Court Rule 315 13
Illinois Supreme Court Rule 63(C) ..... *passim*

OPINIONS BELOW

The unpublished and unreported Order of the Illinois Supreme Court in *Milvertha Pinnick et al. v. Corboy & Demetrio, P.C. et al.* (Docket No. 107359), filed and decided on December 22, 2008, denying petitioners' Motion for Recusal of Supreme Court Justices Pursuant to Supreme Court Rule 63(C) and dismissing as moot petitioners' Motion to Find Limitations of Appointment of Temporary Justices to the Illinois Supreme Court Unconstitutional, is set forth in the Appendix hereto(App. 1-2).

The unpublished Motion by petitioners for Recusal of Supreme Court Justices Pursuant to Supreme Court Rule 63(C) and Motion to Find Limitations of Appointment of Temporary Justices to the Illinois Supreme Court Unconstitutional in *Milvertha Pinnick et al. v. Corboy & Demetrio, P.C. et al.* (Docket No. 107359), filed in the Illinois Supreme Court on November 24, 2008, is set forth in the Appendix hereto(App. 3-13).

The published decision of the Illinois Supreme Court in *Milvertha Pinnick et al. v. Corboy & Demetrio, P.C. et al.* (Docket No. 107359), reported at 904 N.E.2d 985(Ill. 2009), filed and decided March 25, 2009, denying petitioners' Petition for Leave to Appeal, is set forth in the Appendix hereto(App. 14).

The unpublished and unreported modified ruling of the Appellate Court of Illinois, First Judicial District, in *Milvertha Pinnick et al. v. Corboy & Demetrio, P.C. et al.* (Docket No. 1-07-0533), filed and decided on October 20, 2008, affirming the rulings of the Circuit

Court of Cook County, dismissing most of petitioners' malpractice claims and holding that petitioners could only recover $100,000 for their injuries, is set forth in the Appendix hereto(App. 15- 48).

The unpublished judgment of the Appellate Court of Illinois, First Judicial District, in *Milvertha Pinnick et al. v. Corboy & Demetrio, P.C. et al.* (Docket No. 1-07-0533), filed October 7, 2008, is set forth in the Appendix hereto(App. 49).

JURISDICTION

The decision of the Supreme Court of Illinois, the highest State court in Illinois in which a decision could be had, denying petitioners' Petition for Leave to Appeal and leaving petitioners with no further appellate remedy in the State courts concerning the refusal of four of the Supreme Court Justices to recuse themselves from this case, was decided and filed on March 25, 2009(App.14). The ruling denying petitioners' Petition for Leave to Appeal finally disposed of petitioners' right to the recusal of these Justices based upon the due process clause of the federal constitution, all consistent with the language of 28 U.S.C. § 1257(a).

On June 13, 2009, petitioners applied to Mr. Justice Stevens of this Court for an extension of time of forty-five (45) days, or until August 7, 2009, to file their petition for certiorari from the decision of the Illinois Supreme Court on March 25, 2009, denying petitioners' Petition for Leave to Appeal. On June 17, 2009, Mr. Justice Stevens extended the time for petitioners to file this petition until August 7, 2009. This petition is filed

within the time for filing as extended by Mr. Justice Stevens.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1257(a).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment XIV, § 1:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....

28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 455:

(a) Any justice, judge, or magistrate judge of the United States Shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of a disputed evidentiary facts concerning the proceeding;

....

(4) He knows that he, individually or as a fiduciary...has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome....;

....

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in the household.

(d) For the purposes of this section, the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes...appellate review"...;

....

(4) "financial interest" means ownership of a legal or equitable interest, however small....

Illinois State Constitution, Article VI, § 3:

> SUPREME COURT—ORGANIZATION
> The Supreme Court shall consist of seven judges. Three shall be selected from the First Judicial District, and one from each of the other Judicial Districts. Four Judges constitute a uorum and the concurrence of four is necessary for a decision. Supreme Court Judges shall select a Chief Justice from their number to serve for a term of three years.

Illinois State Constitution, Article VI, § 16:

> ADMINISTRATION
> General administrative and supervisory authority over all courts is vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules. The Supreme Court Shall appoint an administrative director and staff, who shall serve at its pleasure, to assist the Chief Justice in its duties. The Supreme Court may assign a Judge temporarily to any court and an Associate Judge to serve temporarily as an Associate Judge on any Circuit Court. The Supreme Court shall provide by rule for expeditious and inexpensive appeals.

Illinois Supreme Court Rule 63(C):

> **Disqualification.**
> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

....

(d) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse...or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding, or has any other more than *de minimis* interest that could be substantially affected by the proceeding; or

(e) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:

...

(iii) is known by the judge to have a more than *de minimis* interest that could be substantially affected by the proceeding....

Illinois Code of Civil Procedure 735 ILCS 5/2-1001:

Sec. 2-1001. Substitution of judge.

(a) A substitution of a judge in any civil action may be had in the following situations:

....

(3) Substitution of cause. When cause exists.

...

(iii) Upon the filing of a petition for substitution of judge for cause a hearing to determine whether the cause exists shall be conducted as soon as possible by a judge other than the judge named in the petition. The judge named in the petition need not certify but may submit an

affidavit if the judge wishes. If the petition is allowed, the case shall be assigned to a judge not named in the petition. If the petition is denied, the case shall be assigned back to a judge named in the petition.

Illinois Senate Joint Resolution Constitutional Amendment 10 (SJRCA10):

[proposing the following language as subsection (b) to Article VI, § 3]

(b) If a Supreme Court Judge recuses himself or herself in a particular case or matter before the Court because of an actual or potential conflict of interest, then the Judge shall notify the Clerk of the Supreme Court in writing of the recusal. A Judge of the Appellate Court shall then be selected to serve as an Interim Supreme Court Judge to hear that particular or matter until it is resolved or otherwise disposed of by the Court. The Interim Supreme Court Judge shall be selected in a random manner from a pool of Appellate Judges as determined by Supreme Court Rule.

STATEMENT

In August of 1995, Johnny Waites rented a 1994 Mitsubishi *Diamante* station wagon from McFrugal Auto Rental in Atlanta, Georgia. The next day, Ms. Constance McNair and Ms. Melissa Pinnick ("Melissa"), cousins and both mothers, drove the vehicle from Atlanta to Joliet, Illinois, to visit members of their family. With them on the trip were four children

including two of Melissa's young children, a daughter Manna, one and one-half years old, ("Manna") and a son Cortland, then six years of age ("Cortland") ("petitioners").

During the trip to Illinois, Melissa encountered trouble with the *Diamante* and she phoned Waites to tell him that the automobile was stalling and could only be restarted after several attempts. After arriving in Joliet, Melissa's father unsuccessfully attempted to determine the cause of the stalling problem or to have McFrugal replace the vehicle while in Joliet.

On August 17, 1995, Melissa and her cousin together with their children headed back to Atlanta in the *Diamante*. McNair was driving the vehicle and Melissa was in the front passenger seat with their children located in the backseat. At about 2:30 A.M., McNair was driving southbound on Interstate 65 in Indiana when she heard a noise, felt the left tire "shift" and then lost control of the car. According to McNair, the vehicle completely shut down—the car's lights went out and the brakes and steering did not work. The *Diamante* slid across the road out of control, then through the median separating the southbound from the northbound lanes of the Interstate and came to rest in the passing lane of the northbound traffic lanes.

Without lights and with doors which would not unlock, frantically McNair tried to restart the car. As she did so, a northbound Cadillac driven by James Dinsmore struck the disabled *Diamante*. The collision killed Melissa and critically injured her two children. Manna sustained a spinal cord injury and Cortland suffered traumatic psychological injuries, still endured

today, as the result of waking up in the crushed automobile to see his deceased mother's head facing backwards.

In the aftermath of the accident, Melissa's father, Robert Pinnick, contacted an attorney and family friend, Vincent Cornelius, who recommended that respondent Corboy & Demetrio, P.C.("the Firm") represent the Pinnick family. On August 30, 1995, Cornelius contacted respondent Robert Bingle, Esq., the Firm's managing partner("Bingle"). Cornelius told Bingle that the *Diamante*'s owner, McFrugal Auto Rental in Atlanta, Georgia, was attempting to retrieve the damaged car which was being stored in an auto pound in Indiana.

On September 1, 1995, Bingle met with Robert Pinnick and Cornelius and told both of them that the Firm would obtain a court order to preserve the automobile in its present state (for the purpose of forensic analysis) and that he would have someone from the Firm investigate the vehicle. The Firm through Bingle then agreed to take the case; Milvertha Pinnick executed three retainer agreements as the personal representative of the petitioner Estate of Melissa Pinnick and the next friend of both children Manna Pinnick and Cortland Pinnick("petitioners").

On the facts as he knew them, Bingle apprehended the potential for several causes of action on behalf of petitioners: (1) an action against McFrugal Auto Rental in Atlanta for its negligent maintenance of the *Diamante*; (2) an action against both McNair and James Dinsmore for the negligent operation of their respective vehicles; (3) a product liability suit against

Goodyear, the tire manufacturer, for any discovered defects in the tire(s) which may have contributed to the accident; and (4) a product liability suit against the *Diamante's* manufacturer (Mitsubishi) for any defects eventually discovered in the automobile itself.

Following the meeting, Bingle telephoned the investigative firm Spahn-Breckinridge to find and photograph the *Diamante*. The vehicle was located that afternoon and the following day, Saturday, September 2, 1995, its private investigator (Edmund Rooney) ordered the police report of the accident and visited Highland Towing in Highland, Indiana where he photographed the wrecked *Diamante* and left his business card with instructions to contact him if anyone sought to remove the vehicle. In the meantime, Bingle dictated a memo to the case file that the Firm needed "to check out whether or not we need to get a protective order on the vehicle," that the Firm "need[s] to follow up on this end of aspect [*sic*] of the case immediately," and that the Firm "may need to file a lawsuit in order to get a protective order."

Bingle opted to enjoy the Labor Day weekend without obtaining the protective order and assigned the case to respondent G. Grant Dixon, III, Esq., ("Dixon"), an associate at the Firm. Dixon's "to do" list included obtaining a protective order prohibiting anyone, including McFrugal Auto Rental, Mitsubishi or Goodyear, from removing, altering or in any way changing the physical state of the *Diamante* pending its examination by the Firm's experts in order to determine the cause of the accident. By September 12, 1995, investigator Edmund Rooney filed his report of the accident together with photographs he took of the

Diamante. Rooney noted that there were defects in the automobile's flat right rear tire and that these defects were probably *not* caused by the impact of the collision.

Thereafter, respondents *never* obtained the protective order to preserve the *Daimante* and, obviously without the vehicle, failed to engage a forensic auto or tire expert to add to Rooney's rudimentary investigation, analyze the vehicle and determine with scientific probability the cause of the accident. Without a protective order in place, McFrugal, on September 27, 1995, took possession of the vehicle from Highland Towing in Indiana. Thereafter, the vehicle was never located, although a salvage title was issued by the State of Florida in late January of 1996.

Compounding this careless lack of oversight by respondents about the whereabouts of the *Diamante* during this crucial period in September of 1995, Bingle in September or October lied to Cornelius, the Pinnick's family attorney, telling him that the vehicle actually had been "checked out and that there was no issue with the vehicle." As part of this subterfuge, Bingle denied Cornelius' offer to take over the case, preventing Cornelius from examining file documents showing none of respondents had secured the automobile or obtained an expert forensic analysis of the *Diamante* or its tires before it was taken by McFrugal and then destroyed. Bingle's lie that the vehicle had "checked out" was made while simultaneously respondent Dixon had his investigative firm scouring Illinois' Mitsubishi dealerships for the *Diamante* or a replacement, a search which continued until the Circuit Court dismissed the case three years later.

On November 29, 1995, the Firm's Dixon on behalf of petitioners filed suit in the federal district court for the Northern District of Indiana against James Dinsmore based upon his negligent operation of his vehicle. The suit proceeded for three years until December 9, 1998, when the district judge dismissed petitioners' complaint as a sanction for the Firm's "lengthy pattern of discovery abuses" and its failure to abide by the trial judge's discovery orders.

In the wake of this dismissal in federal court, petitioners sued respondents Corboy & Demetrio, P.C., Bingle and Dixon in the Circuit Court of Cook County, Illinois, for spoliation of evidence under Count I; legal malpractice under Counts II through V; and for fraudulent concealment under Count VI in lying and failing "to inform [the petitioners] that they had neglected to perform an investigation of the car or its tires for the purpose of pursuing claims against Mitsubishi, Goodyear or McFrugal."

The State trial court entered summary judgment against petitioners on Count I's spoliation claim because it ruled, after melding the spoliation count into the product liability counts, Counts III-V, there was no duty to secure and on all the legal malpractice claims except Count II for lack of proof. It dismissed Count VI's fraudulent concealment claim because it could not be proven independent of any legal malpractice claim. As for Count II, the legal malpractice claim stemming from the dismissal of petitioners' claims against Dinsmore in the Indiana federal district court on account of the Firm's discovery abuses, the Firm at trial admitted liability. However, the trial court granted respondents' motion to cap its liability under

this count at $100,000, Dinsmore's limits of coverage on his automobile policy. On February 12. 2007, a judgment was entered consistent therewith.

Upon petitioners' appeal from these rulings, the Appellate Court of Illinois for the First Judicial District issued its modified order on October 20, 2008, affirming all of the trial court's ruling with minor revisions(App. 15-48;49). The Illinois Supreme Court then allowed petitioners' motion for extension of time allowing them until November 24, 2008, to file their Petition for Leave to Appeal in that court(App. 4).

Pursuant to Illinois Supreme Court Rule 315, petitioners instituted a Petition for Leave to Appeal to the Supreme Court of Illinois, on November 24, 2008, challenging each and every ruling of the Illinois intermediate appellate court(App. 4). Concurrently, petitioners moved for the recusal of four (4) of the seven (7) Illinois Supreme Court Justices pursuant to Supreme Court Rule 63(C) and for the appointment of temporary Justices for those Justices who should recuse themselves(App. 3-13). Specifically, petitioners claimed that respondent Firm is "the most recognized and renowned plaintiffs' product liability law firm not only in Chicago and Illinois, but throughout the country" (App. 4).

More important, petitioners alleged that the Firm through its attorneys, its experts and its witnesses has exercised pervasive personal and professional influence over the Illinois judiciary generally and the Supreme Court of Illinois in particular by establishing a close, confidential relationship with at least four (4) of the Justices of the

Supreme Court(App. 4-5). It has done so by making substantial election campaign contributions-----clearly more than the *de minimis* amount requiring disqualification under Illinois Supreme Court Rule 63(C)(1)(d) and (e)(iii)-----to some of its Justices:

> Specifically, Chief Justice Thomas R. Fitzgerald has received in excess of $52,000 from [respondent] Bingle and [respondent] Corboy & Demetrio's partners, Philip Corboy, Philip Corboy, Jr., Michael Demetrio and Thomas Demetrio; Justice Charles E. Freeman has received $5,000 from [respondents] Bingle and Corboy partner Philip Corboy, Jr.; Justice Robert Thomas has received in excess of $16,000 from [respondents] Bingle and the Corboy partners; and while Justice Ann M. Burke has personally received contributions of only $1,500, her husband, Edward M. Burke, has received in excess of $24,000 from [respondents] Corboy partners Thomas Demetrio and Philip Corboy.

(App. 5-6).

In addition, petitioners contended that the Firm's legal experts Robert Clifford of the Clifford Law Offices and Joseph Power of Power Rogers & Smith, P.C., "have contributed substantial amounts to the abovementioned Justices including $25,000 to Justice Charles E. Freeman and $17,000 to Justice Robert Thomas"(App. 6). Besides these campaign contributions, petitioners alleged that Justice Robert Thomas recently received $7,000,000 in a defamation lawsuit where he was represented by the Firm's legal expert Joseph Power of Power Rogers & Smith,

P.C.(App. 6).

Petitioners concluded that all of these campaign contributions by respondents, well in excess of $100,000 and sometimes approaching 20% of the total contributions received by a given Justice, together with Justice Thomas' close relationship with the Firm's legal expert Joseph Power of Power Rogers & Smith, P.C., prevent these four Justices from fairly and impartially hearing this appeal (App. 6-8). They accordingly sought their recusal "from hearing any arguments or rendering any decision in this matter including, but not limited to, ruling on [their] Petition for Leave to Appeal and [their] appeal to the Illinois Supreme Court if Leave to Appeal is allowed"(App. 8).

Petitioners argued that the risk that these campaign contributions will compromise the four Justices' ability to fairly or impartially hear this appeal, or have caused their fairness and impartiality to be reasonably questioned in the circumstances, is even more compelling than the risk of bias or prejudgment considered by this Court in the then pending case of *Hugh M. Caperton et al. v. A.T. Massey Coal Company, Inc. et al.*, U.S. Supreme Court Docket No. 08-22, decided at 556 U.S. ___; 129 S.Ct. 2252(June 8, 2009)("*Caperton*")(App. 7-8).

While the campaign contribution in *Caperton* represented 60% of the appellate judge's total contributions, *only one* appellate judge of the West Virginia Supreme Court was affected by the contributions in that case and there were four (4) other appellate judges who could minimize the taint of prejudice(App. 7-8). Here, on the other hand, the

campaign contributions by respondents have compromised the ability of *four* of the seven (7) Justices of the Illinois Supreme Court to fairly and impartially consider petitioners' Petition for Leave to Appeal(App. 8). The resulting bias of four sitting Justices renders it impossible that petitioners could ever collect the four votes necessary to have their petition for Leave to Appeal granted(*Id.*).

Moreover, in *Caperton*, the campaign contributions were not made by the party itself but rather by its major shareholder and one of its officers(App. 7). Here, however, respondent Corboy & Demetrio, P.C., *itself together with respondents Bingle and Dixon as well as its legal experts have directly contributed* to four Justices' election campaigns or allied themselves *directly* with these Justices so that their ability to fairly and impartially decide this appeal has been compromised or appears to have been compromised(App. 7-8).

Finally, petitioners asked the Illinois Supreme Court to reconsider its previous decisions determining that it was incapable of appointing or designating temporary substitute Justices to replace a Justice who could not hear an appeal because of a disqualifying bias or interest (App. 9-11). As petitioners argued, if this failure to appoint substitute Justices results in a lack of a quorum to even consider a petition for Leave to Appeal under the Illinois Supreme Court Rules, thus preventing any relief whatsoever for petitioners seeking further appellate review from the State's highest court, the resulting lack of a meaningful appellate remedy violates the due process clause of the fourteenth amendment to the federal constitution "and

must be found unconstitutional"(App. 11).

On December 22, 2008, the Supreme Court of Illinois denied petitioners' Motion for Recusal of Supreme Court Justices Pursuant to Supreme Court Rule 63(C), and dismissed as moot the petitioners' Motion to Find Limitations of Appointment of Temporary Justices to the Illinois Supreme Court Unconstitutional(App. 1-2).

On February 3, 2009, following the Illinois Supreme Court's denial of petitioners' Motion for Recusal of Supreme Court Justices Pursuant to Supreme Court Rule 63(C), the Illinois State Senate's Executive Committee recommended to the Executive Subcommittee on Constitutional Amendments an amendment to the Illinois Constitution Art. VI, § 3, which would allow for temporary appointments to the Illinois Supreme Court when a sitting justice recuses him or herself because of an actual or perceived conflict of interest. The recused justice would be replaced by a judge of the appellate court selected in a random manner to be determined by Supreme Court Rule.

In the wake of the Illinois Supreme Court's denial of their Motion for Recusal of Supreme Court Justices Pursuant to Supreme Court Rule 63(C), petitioners brought in this Court a petition for writ of certiorari to the Illinois Supreme Court(*Milvertha Pinnick et al. v. Corboy & Demetrio, P.C. et al.*, U.S. Supreme Court Docket No. 08-1129). It sought to have this ruling by the State's highest court vacated and to have this Court decide as a matter of due process that these four Justices of the Illinois Supreme Court

> were required to recuse themselves from this proceeding once it was shown that the close personal relationships with and substantial contributions to their election campaigns or to their spouses by one of the parties appearing before them created an objective probability that each of these Justices was biased in favor of that party and against petitioners or because these circumstances created a factual backdrop against which their impartiality might reasonably be questioned....

(*Id.*, Petition for Certiorari at 31-32). Petitioners further asked this Court to remand the matter to the Illinois Supreme Court for reconsideration in light of this Court's then anticipated decision in *Caperton.*

While petitioners' petition for certiorari was pending before this Court, the Illinois Supreme Court proceeded to deny petitioners' Petition for Leave to Appeal on March 25, 2009, leaving petitioners with no further appellate remedy in the Illinois State courts in order to have the judgment entered against them either reviewed or reversed(*Milvertha Pinnick et al. v. Corboy & Demetrio, P.C. et al.*, 904 N.E.2d 985(Ill. 2009)(App. 14). Petitioners apprised this Court of the Illinois Supreme Court's ruling in a supplemental Brief (*Milvertha Pinnick et al. v. Corboy & Demetrio, P.C. et al.*, U.S. Supreme Court Docket No. 08-1129, Supplemental Brief).

On June 8, 2009, while petitioners' petition for certiorari was still pending, this Court decided *Hugh M. Caperton et al. v. A.T. Massey Coal Company, Inc. et al.*, 556 U.S.___; 129 S.Ct. 2252(2009). In *Caperton*,

the Coal Company's chairman, CEO and president contributed $3 million toward the successful election of Justice Brent Benjamin of the West Virginia Supreme Court. *Id.* at ___;129 S.Ct. at 2257. In the wake of Justice Benjamin's election, the State's highest court considered an appeal by the defendant Coal Company from a jury verdict awarding the plaintiffs in that case the sum of $50 million in compensatory and punitive damages for the Coal Company's fraudulent misrepresentations, concealment, and tortious interference with existing contractual relations. *Id.* at ___;129 S.Ct. at 2257. After denying the plaintiffs' motion to recuse himself from considering the Coal Company's appeal because of the contributions made to his election campaign by its chairman, CEO and president, Justice Benjamin cast the deciding vote in a 3-2 decision by the West Virginia Supreme Court reversing the $50 million verdict against the Coal Company. *Id.* at ___;129 S.Ct. at 2257-2258. A rehearing by the West Virginia Supreme Court produced another refusal by Justice Benjamin to recuse himself and another 3-2 vote reversing the jury's $50 million verdict. *Id.* at ___;129 S.Ct. at 2257-2258.

Mr. Justice Kennedy, writing for a majority of five Justices, vacated the ruling by the West Virginia Supreme Court and remanded the case to that court because "in all the circumstances of this case, due process requires [Justice Benjamin's] recusal." *Id.* at ___; 129 S.Ct. at 2254. Drawing upon *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 823-824(1986), *Withrow v. Larkin*, 421 U.S. 35, 47(1975), *Ward v. Monroeville*, 409 U.S. 57, 60(1972) and *Tumey v. Ohio*, 273 U.S. 510, 535(1927), the majority held that the objective standards contained in the due process clause provide

more reliable guideposts for the discovery of a judge's actual bias than his own personal inquiry into such matters. *Id.* at ___;129 S.Ct. at 2262-2265. These objective due process standards do not require proof of actual bias but instead ask whether "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.* at __; 129 S.Ct. at 2263 quoting *Withrow*, 427 U.S. at 47.

Applying these objective standards, the majority concluded

> there is a serious risk of actual bias----based on objective and reasonable perceptions----when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign,the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.

Id. at ___;129 S.Ct. at 2263-2264.

Since the contributions here eclipsed all of the other contributions by supporters of Justice Benjamin and therefore had a significant and disproportionate effect on the electoral outcome and because the

temporal relationship between the campaign contributions, the justice's election and the pendency of the case was "critical," the majority ruled that the risk that these contributions may have engendered actual bias by Justice Benjamin in the case was "sufficiently substantial that it 'must be forbidden if the guarantee of due process is to be adequately implemented.'" *Id.* quoting *Withrow, supra.*

As the majority concluded, "[j]ust as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties----a man chooses the judge in his own cause." *Id.* at ___;129 S.Ct. at 2264-65. Applying this principle to the judicial election process, there was on this record a serious, objective risk of actual bias that required Justice Benjamin's recusal. *Id.*

Chief Justice Roberts, joined by Justices Scalia, Thomas and Alito, filed a dissenting opinion arguing that the majority's "probability of bias" standard for requiring a judge's recusal was too elusive and unpredictable a standard upon which to grant relief in this context. 556 U.S. at ___;129 S.Ct. at 2267-2274. Justice Scalia also filed a separate dissenting opinion. 556 U.S. at ___;129 S.Ct. at 2274-2275.

On June 29, 2009, the Court denied petitioners' pending petition for certiorari in *Milvertha Pinnick et al. v. Corboy & Demetrio, P.C. et al.*, U.S. Supreme Court Docket No. 08-1129. 557 U.S.___; 2009 US LEXIS 4751(2009).

On June 13, 2009, petitioners applied to Mr. Justice Stevens of this Court for an extension of time of

forty-five (45) days, or until August 7, 2009, to file their petition for certiorari from the final decision of the Illinois Supreme Court on March 25, 2009, denying petitioners' Petition for Leave to Appeal. On June 17, 2009, Mr. Justice Stevens extended the time for petitioners to file this petition until August 7, 2009.

REASONS FOR GRANTING THE PETITION

The Illinois Appellate Proceedings Deny Petitioners Due Process Because They Allow Participation By Appellate Judges Who Receive Substantial Campaign Contributions Directly From—And Have Close Personal and Professional Ties With----the Parties Opposing Their Appeal, Circumstances Which Prove The Objective Probability of Actual Bias Or Provide the Basis Upon Which The Judges' Impartiality Might Reasonably Be Questioned.

A. The Due Process Deprivation After Caperton.

As the majority in *Caperton* made clear, due process requires a neutral and detached judge both at the trial and appellate level. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533(2004) quoting *Ward v. Vill. of Monroeville*, 409 U.S. 57, 61-62 (1972). *Withrow v. Larkin*, 421 U.S. 35, 46-47(1975). *In re Murchison*, 349 U.S. 133, 136 (1955). Trial and appellate judges are more than mere umpires----in fact, they are the governors of the proceedings before them----and they cannot become an advocate or otherwise use their judicial powers to advantage or disadvantage a party. *Quercia v. United States*, 289 U.S. 466, 470(1933). Nor "should [they] give vent to personal spleen or respond to a personal grievance." *Offutt v. United States*, 348 U.S. 11,14(1954). See 28 U.S.C. §§ 455(a) and (b)(1).

The Court in *Caperton* established that the due process clause provides a constitutional floor in analyzing when recusal of a judge is required, i.e., "when the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable"----when, that is, there is a "serious, objective risk of actual bias." 556 U.S. at ___;129 S.Ct. at 2257;2265. The objective due process standards do not require proof of actual bias but instead ask whether "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.* at __;129 S.Ct. at 2263 quoting *Withrow*, 427 U.S. at 47.

The circumstances in *Caperton* combined to convince the majority that *the respondent Coal Company had effectively chosen the judge—one of five—who would hear its appeal.* Through its chairman, CEO and president, the Coal Company made $3 million in campaign contributions to Justice Benjamin, much more than his other supporters at a time when the case was sure to be heard by the West Virginia Supreme Court, a temporal nexus which it called "critical" to its conclusion that these contributions may have engendered actual bias by Justice Benjamin in hearing this appeal.

As the *Caperton* majority concluded, "there is a serious risk of actual bias----based on objective and reasonable perceptions----*when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on*

the case...[because] no man is allowed to...choose[] the judge in his own cause." *Id.* at ___;129 S.Ct. at 2263(emphasis supplied).

While the thrust of the Court's objective due process analysis in *Caperton* was whether the respondent Coal Company had effectively chosen the judge who would hear its appeal by offering that judge through its principal an excessive amount of contributions for his election campaign, the Court's analysis did not exhaust the circumstances under which a party with a personal stake in a case could have "a significant and disproportionate influence in placing the judge on the case" for purposes of its due process calculus.

The principle emerging from this due process analysis by the *Caperton* majority is that a party may not consistent with due process choose the judge who will rule on his appeal, *however it is brought about*, i.e., either by excessive campaign contributions or by other factors influencing the selection of the judge, so that, objectively viewed, "the risk that [the Firm's] influence engendered actual bias [by the judge] is sufficiently substantial that it 'must be forbidden if the guarantee of due process is to be adequately implemented.'" *Id.* at __; 129 S.Ct. at 2263 quoting *Withrow*, 427 U.S. at 47.

This petition comes clearly within this principle enunciated by the *Caperton* majority. Not only have *four* Justices of the Illinois Supreme Court received significant campaign contributions *directly* from a party rather than its proxy but also these same four Justices have close personal and professional ties to the Firm and are beholden to it for their selection as justices in

the first place. In these circumstances, objectively viewed, the risk that the Firm's influence engendered actual bias on the part of these four Justices is sufficiently substantial within *Caperton's* rationale that it must be forbidden if the guarantee of due process is to be adequately implemented.

Stated another way, these four Justices have objectively lost, or have appeared to lose, their ability to decide petitioners' appeal fairly and impartially so that recusal is warranted as a matter of due process. The Firm together with the other respondents in this case not only furnished each of these four Justices with substantial campaign contributions but also provided them with the political machinery, the "slating," and the votes so that these justices were selected to run and then elected to their positions in the first place. This is more than *Caperton's* very substantial campaign contributions; here the substantial campaign contributions are coupled with the Firm's established political power in assuring that the judges it "slates" for election are, in fact, elected. This combination of political power and campaign contributions far surpasses the leverage which the Coal Company brought to bear in *Caperton* and argues persuasively for a finding of actual bias under *Caperton's* objective due process standard.

This constitutional standard for recusal, i.e., that recusal is required as a matter of due process when the appearance of partiality is serious enough to generate an objective "probability of actual bias," *Caperton*, *supra*; *Withrow*, *supra*, is supplemented by a more stringent non-constitutional standard expressed in federal law and various state and federal judicial codes,

i.e., that recusal is mandated where a judge's "impartiality might reasonably be questioned."See 28 U.S.C. §§ 455(a); Illinois Supreme Court Rule 63(C)(1)(" A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned...."); ABA Model Code of Judicial Conduct R. 2.11 (A)(2007)(same). Petitioners submit that the Justices' recusal was required here under either standard.

In the first place, as the Court made clear in *Caperton*, *Tumey* and *Lavoie*, the ability of the judicial officers to rule fairly and impartially is fatally compromised by the *possibility* of a financial interest in the outcome of the cases before them. In *Lavoie*, the Court determined that it was a violation of due process for a State supreme court justice to participate in the court's review of a verdict of bad-faith refusal to pay an insurance claim because this justice was pursuing his own bad-faith suit against *another insurance company* and the outcome of the case before the court *might* have had a direct effect on the outcome of the justice's case. 475 U.S. at 825. The Court noted that the "possible temptation" suggested by these attenuated facts was enough to conclude that a probability of actual bias existed sufficient to constitutionally impugn the proceedings.*Id.*

A fortiori, where members of the Supreme Court of Illinois, charged by statute and by State constitution with correcting errors in the trial and intermediate appellate courts, have close personal and professional relationships with the Firm----and are beholden to it for being selected as Justices in the first place---and then receive from it substantial financial contributions for

their election campaigns or for their spouses, there is more than the "possible temptation" of having these factors sway their disposition when the Firm appears before it as a party. The facts here are even more compelling than the attenuated interest of the supreme court justice in *Lavoie* and together surpass the facts in *Caperton* which compelled this Court to require recusal. They show an objective probability of actual bias by four of the Justices against the petitioners on this appeal and in favor of their friends and close associates connected to the Firm, the respondents who made these substantial contributions and who facilitated their selection as judges in the first place.

For the record, the respondent Firm and their legal experts have given at least $115,750 to three of the Justices' political committees—$52,500 for Chief Justice Fitzgerald, $33,250 for Justice Thomas, $30,000 for Justice Freeman-----as well as $26,500 to Justice Burke and her husband, City of Chicago alderman Edward Burke who is also Chairman of the Cook County Democratic Party's judicial "slating" committee. He presides over and greatly influences the individuals nominated in Cook County for judicial "slating" (Chief Justice Fitzgerald, Justice Burke and Justice Freeman were all "slated" and elected from Cook County).

Second, the Firm and its principal partners are the primary determinants of who will be "slated" for judgeships county and state-wide, who will receive the most money for their respective election campaigns (depending on whether their elections are contested) and *who will eventually be elevated to the State's judicial appellate tier*. "Slating" by party means that

the candidate has the support of the ward boss who can deliver votes and, in a judicial election where the winning candidate may need only 30,000 votes to win, guaranteed votes are crucial to success. Loyalty is expected to be shown by those judges who benefit from this support by the Firm.

Besides "slating" favored judges for appellate judgeships, the respondent Firm's partners maintain a broad range of personal and professional relationships with members of the State judiciary. The Firm's partners and the Justices of the Supreme Court are frequent invitees at each other's social and professional gatherings and the Firm's partners have served numerous terms as president of various bar associations including the Illinois State Bar Association, the Chicago Bar Association and the Illinois Trial Lawyers Association as well as presiding over county and state judicial selection and qualification committees.

In this environment, the Justices' receipt of substantial financial contributions directly from a party appearing before it----a party who enjoys an ongoing personal and professional relationship with these same Justices----is sufficient to prove an objective probability of actual bias warranting their recusal as a matter of due process. These same facts provide a sufficient basis for reasonably questioning their impartiality under both state and federal judicial codes. Recusal was therefore warranted as a matter of due process. *Caperton, supra. Withrow v. Larkin, supra. In re Murchison, supra.*

Indeed, recent research by political scientists at the University of Pittsburgh and Utah State University shows a strong correlation between campaign contributions and decisions by the State Supreme Court judges in states that elect those judges, especially in states where judges are elected in partisan contests (e.g., Michigan and Texas) as opposed to being listed on a nonpartisan ballot (e.g., Nevada). In an environment where attorneys and law firms make campaign contributions, the study found that judges notice those who contribute relatively large sums of money so that when liberal attorneys contribute more money to a judge's election campaign, the likelihood of a liberal decision increases; the same is true for contributions made by conservative attorneys; and the contribution advantage does not have to be that high for the likelihood of victory to increase significantly.

Thus substantial contributions to an appellate judge's election campaign inevitably influence his or her decision-making process and a rule which disqualifies a judge in a proceeding in which there is an objective "probability of actual bias" because of such substantial contributions or where his partiality might reasonably be questioned on the same ground, including instances where he has a close personal or professional relationship with a party appearing before him—indeed, the judge is beholden to the party for being selected as a judge in the first place----guarantees a fair hearing consonant with due process.

In his dissent, Chief Justice Roberts argued that the majority's decision would open the floodgates for a wide variety of *Caperton*-styled disqualification motions, positing a series of forty (40) questions which

he contends identify the imprecision of the majority's analysis. 556 U.S. at ___;129 S.Ct. at 2267-2275. Answering these questions presents this Court with the unparalleled opportunity to provide guidance to the Illinois Supreme Court as well as other appellate courts generally in determining when recusal is required as a matter of due process.

For example, in response to how much money in campaign contributions is required before recusal is required because of the "probability of bias"(#1), the answer must be that it depends on how the amount of money combines with *the power of the contributor*, usually a top donor like the Firm, to determine judicial "slating" and the certainty of the judge achieving his/her judicial seat. A contribution is "disproportionate" (#2) when it is out of all relationship to the donor's single standing; when it is made to signify a person as a "top donor" in order to be remembered by the judge as more than just another attendee at a fundraising event. Moreover (#3), *all* financial support must be considered as long as it can be identified as coming from the same source; and (#4) it should not matter if the donor makes large contributions in other elections.

Further responding to Chief Justice Roberts' questions (#5), the nature of the relief sought should be irrelevant to the analysis of whether there is an unconstitutional probability of bias since this inquiry depends primarily on the combination of factors (e.g., money, political power, personal alliances, etc.) which give a donor special leverage in obtaining a favorable ruling. Nor (#6) should it matter on what judicial tier the judge sits—the probability of bias warranting

recusal can occur at the trial, intermediate appellate and the ultimate appellate level. As a matter of common sense and "a realistic appraisal of psychological tendencies and human weakness," the probability of bias (#7) should last as long as the judge can be expected to remember his major contributors, his dominant political allies and his close friends.

In both *Caperton* and this case, the votes of the affected justices' were outcome determinative (#13). However, the propriety of recusal should not rest on this factor. The merits of the case should be irrelevant to the need for recusal by the original judge(#14) since a replacement judge, one free of the probability of bias, will be presumed to have made the "right" decision consonant with due process. However, if a trial judge refuses to recuse himself and his decision on the merits is affirmed by an appellate panel(#15), the result may be defensible if the burden of showing error on the merits of the controversy was not otherwise sufficient to warrant appellate reversal. Independent review by another judge of a recusal decision—as long as the other judge or panel is untouched by the probability of bias—would validate decisions refusing to recuse(#19).

In making this calculus about the probability of bias, the close personal friendship between the judge and a party is a relevant consideration(#20). While it is unclear whether in *Caperton* Justice Benjamin had a friendship with the Coal Company's principal, here the four Justices maintained for years—even decades---close personal friendship with the Firm, its partners and the other respondents, relationships which definitely should have been considered in measuring the probability of bias in this case. Furthermore, the

objective test of *Caperton* has more resonance here because the donor is not a party's attorney *but rather a party itself in these proceedings*(#22). Nor should this due process analysis vary among the several States(#23).

The crucial inquiry after *Caperton* is whether factors such as money, campaign contributions, political power, personal friendships, etc. operate in combination or alone to create a probability of bias such that "a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case...[because] no man is allowed to...choose[] the judge in his own cause." *Id.* at ___;129 S.Ct. at 2263(emphasis supplied). Strict causation plays no role in this objective analysis (#25); rather common sense together with "a realistic appraisal of psychological tendencies and human weakness" provide reliable guideposts. Moreover, the timing of the judge's election should have no influence in determining a probability of bias in any particular case because the right to due process doe not depend on when the case was filed(#28).

As far as attribution of campaign contributions is concerned(#29), any contribution by the Firm's partners, associates or employees should be imputed to the Firm; and the same result should obtain when members of the same family make campaign contributions to judges. In addition, it should not matter whether the judge is running unopposed or in a contested race for the objective due process test to apply(#30). Here, Justice Freeman ran unopposed in 2000, yet received $5,000 from respondents together with $25,000 from respondents' experts. Justice Anne

Burke ran unopposed in 2008 and still received $1500 from respondents while her husband, Alderman Edward Burke, received $3,000 for his campaign.

The contributions made to other judges during other campaigns do not "dilute the debt of gratitude"(#32). The test remains an objective one: substantial contributions, whenever made, should be considered in any calculus measuring the probability of bias. As state actors, the Justices here should be liable under 42 U.S.C. § 1983, if they refused to recuse themselves where there was a probability of bias(#33); and the same state limitations period and retroactivity principles should govern the reach of such actions(#34). As for relief in the wake of a "*Caperton* ruling" (#35), cases should be remanded to the affected court for further proceedings beginning with those proceedings which remain uncontaminated before the affected judge refused to recuse himself. Here, this Court could justifiably remand the matter to the Circuit Court of Cook County for a new trial of petitioners' claims before Judge Susan Zwick.

Finally, limited discovery should be available on *Caperton* motions, subject to appropriate sanctions(#37); and a judge's personal view of his own bias, as in *Caperton*, ought to be irrelevant in an objective determination of actual bias(#39).

B. The Failure of the Illinois Constitutional Scheme To Provide For Temporary or Replacement Judges Denies the Petitioners Due Process.

If petitioners' motion for recusal of the four Justices of the Illinois Supreme Court had been successful, the Court would have lacked a quorum under Article VI, § 3, of the Illinois Constitution to conduct further review of this case and because a clear majority of four votes out of seven is necessary to grant petitioners' Petition for Leave to appeal, it would have lacked the power to grant the petitioners' Petition for Leave to Appeal, leaving intact the ruling of the intermediate appellate court and leaving petitioners with no remedy at the highest appellate level in the State.

The solution for this lack of a quorum and lack of a majority would be for the State Supreme Court to appoint replacement judges from the other appellate courts in the State to sit for those judges who have recused themselves. However, because the State Supreme Court has twice ruled that it does not have the power under Article VI, § 16, of the Illinois Constitution to appoint replacement judges when recusal takes place, see *PHL, Inc. v. Pullman Bank & Trust Company et al.*, 721 N.E.2d 1119, 1120(Ill. 1999); *Perlman v. First Nat. Bank of Chicago*, 331 N.E.2d 65, 65(Ill.1975), there is no effective remedy in the State constitutional scheme to cure this lack of a quorum or of a majority in the Supreme Court, leaving petitioners permanently without an effective or fair appellate remedy in the State's highest court.

This incomplete State constitutional scheme for appointing temporary or replacement judges in the event that a Justice of the Supreme Court recuses himself or herself does not pass muster under the federal due process clause applicable to Illinois via the fourteenth amendment and without such substitute Justices, petitioners have been and will be denied a fair hearing on their claims. The Illinois Supreme Court's cramped conception of its own power to appoint replacement judges when recusal occurs does not cure but compounds this constitutional impropriety.

Once it is determined that the Due Process Clause applies to the State court proceedings, "the question remains what process is due." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541(1985) quoting *Morrissey v. Brewer*, 408 U.S. 471, 481(1972). The Court's decision in *Mathews v. Eldridge*, 424 U.S. 319, 334-335(1976) dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the government's asserted interest, "including the function involved" and the burdens the government would face in providing greater safeguards. *Id.* at 335. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute procedural safeguards." *Id.* See *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-529(2004).

Employing the *Mathews* calculus to the circumstances here in order to balance the petitioners' legitimate private interest in having a meaningful

appellate remedy even if four of the Justices of the Supreme Court recuse themselves against the judicial system's need for efficient administration, the petitioners submit that the process due them consists of the following, as represented by legislation being considered by the Illinois General Assembly to amend Article VI, § 3, of the Illinois Constitution:

> (b) If a Supreme Court Judge recuses himself or herself in a particular case or matter before the Court because of an actual or potential conflict of interest, then the Judge shall notify the Clerk of the Supreme Court in writing of the recusal. A Judge of the Appellate Court shall then be selected to serve as an Interim Supreme Court Judge to hear that particular or matter until it is resolved or otherwise disposed of by the Court. The Interim Supreme Court Judge shall be selected in a random manner from a pool of Appellate Judges as determined by Supreme Court Rule.

(Senate Constitutional Amendment SJRCA10). Petitioners submit that this is the process that is due them under the federal constitution.

CONCLUSION

For the reasons identified herein, a writ of certiorari should issue to review the decision of the Supreme Court of Illinois denying petitioners' Petition for Leave to Appeal and, ultimately, to vacate the Order by four of the Justices refusing to recuse themselves from this case and remand the matter to the Illinois Supreme Court for reconsideration in light of

this Court's decision. In the alternative or in addition, the Court should decide that as a matter of due process these four Justices were required to recuse themselves from this proceeding once it was shown that respondents made substantial contributions to their election campaigns or to their spouses and maintained close personal and professional relationships with these Justices, a combination which proved a probability of bias in favor of respondents and against petitioners. This Court should further declare that the Illinois Supreme Court's practice of refusing to appoint replacement judges for Justices who recuse themselves denies petitioners due process of law; or provide petitioners with such other relief as is fair and just in the circumstances of this case, including remanding this matter to the Circuit Court of Cook County for a new trial of petitioners' claims before Judge Susan Zwick.

Respectfully submitted,

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(any footnotes trail end of each document)
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No. 107359
IN THE SUPREME COURT OF ILLINOIS

MILVERTHA. PINNICK, et al., Petitioners,
v.
CORBOY & DEMETRIO, P.C., et al., Respondents.

Appeal from Appellate Court, First District 1-07-0533
Circuit Court Cook County No. 03 L 8525

ORDER

This cause, coming to be heard on the motion of the petitioners for recusal of certain Supreme Court Justices pursuant to Supreme Court Rule 63(C), and to find limitations of appointment of temporary Justices to the Illinois Supreme Court unconstitutional, due notice having been given to respondents, and the court being fully advised in the premises.

Recusal

Because disqualification is a decision that rests exclusively within the determination of the individual judge per Rule 63, each justice named in the recusal portion of the motion has considered the matter and the following represents the decision of each individual justice:

Chief Justice Fitzgerald denies that portion of the motion requesting that he recuse himself from hearing any argument, or rendering any decision in this matter

including, but not limited to, a decision on the pending petition for leave to appeal;

Justice Freeman denies that portion of the motion requesting that he recuse himself from hearing any argument or rendering any decision in this matter including, but not limited to, a decision on the pending petition, for leave to appeal;

Justice Thomas denies that portion of the motion requesting that he recuse himself from hearing any argument or rendering any decision in this matter including, but not limited to, a decision on the pending petition for leave to appeal; and

Justice Burke denies that portion of the motion requesting that she recuse herself from hearing any argument or rendering any decision in this matter including, but not limited to, a decision on the pending petition for leave to appeal.

Limitations on Appointment of Temporary Justices

Because no individual justice has disqualified himself or herself from participating in this matter, the Court dismisses as moot that portion of the petitioners' motion to find limitations of appointment of temporary Justices to the Illinois Supreme Court unconstitutional.

11/24/08

No.107359

IN THE SUPREME COURT OF ILLINOIS

MILVERTHA PINNICK, Guardian and next friend of MANNA PINNICK and CORTLAND PINNICK, minors, and James Brady, Administrator of the ESTATE OF MELISSA PINNICK, deceased,
Plaintiffs-Petitioners,

vs.

CORBOY & DEMETRIO, P.C., a Professional Corporation, ROBERT J. BINGLE, individually and as Agent of Corboy & Demetrio, P.C., and G. GRANT DIXON, III, Individually and as Agent of Corboy & Demetrio, P.C., Defendants-Respondents.

Appeal No: 1-07-533 from the Circuit Court of Cook County, Illinois No. 03 L 8525

Hon. William D. Maddux, Hon. Daniel M. Locallo, Judges Presiding

PLAINTIFFS-PETITIONERS' MOTION FOR RECUSAL OF SUPREME COURT JUSTICES PURSUANT TO SUPREME COURT RULE 63(C) AND MOTION TO FIND LIMITATIONS OF APPOINTMENT OF TEMPORARY JUSTICES TO THE ILLINOIS SUPREME COURT UNCONSTITUTIONAL

NOW COMES Plaintiffs-Petitioners ("Plaintiffs"), MILVERTHA PINNICK, Guardian and next friend of MANNA PINNICK, a minor, CORTLAND PINNICK and JAMES BRADY, administrator of the estate of

MELISSA PINNICK, deceased, by their attorney, CHARLES A. BOYLE & ASSOCIATES and respectfully move that certain Justices of this Court recuse themselves pursuant to Supreme Court Rule 63(C) and request that this Honorable Court exercise the authority to appoint temporary Justices to replace those Justices who have recused themselves.

INTRODUCTION

This legal malpractice case also alleges fraud and involves the law firm of Carboy & Demetrio, the most recognized and renowned plaintiffs' product liability law firm not only in Chicago and Illinois, but throughout the country, and two of its attorneys, managing partner Robert J. Bingle and former associate G. Grant Dixon III (collectively, "Defendants"). On October 10, 2008, Plaintiffs filed a Motion For Extension Of Time To File Petition For Leave To Appeal pending the Appellate Court's Modified Rule 23 Order. On October 20, 2008, the Appellate Court for the First District, First Division in Appeal No. 1-07-533 issued its Modified Rule 23 Order affirming the Circuit Court of Cook County. The Supreme Court allowed Plaintiffs' Motion for Extension of Time on October 21, 2008, granting Plaintiffs until November 24, 2008, to file their Petition for Leave to Appeal. Concurrently with this Motion, Plaintiffs have timely filed their Petition for Leave to Appeal pursuant to Supreme Court Rule 315(a).

Pursuant to Supreme Court Rule 63(C) and as a result of the plentiful personal and professional influence exerted by Defendants on the Illinois judiciary, particularly judicial elections, several Justices should

recuse themselves from deliberating on Plaintiffs' Petition for Leave to Appeal. This stems from the close and confidential relationships between Defendants and several Justices, Defendants' frequent invitations to Justices to participate in social gatherings[1], home and office visits and substantial financial contributions made by Defendants, their partners, associates, employees, and their legal experts to the campaigns of several Justices and their spouses. Plaintiffs respectfully request that this is an appropriate time for this Honorable Court to reconsider its prior holding in PHL, Inc. v. Pullman Bank & Trust Co., 86100, 721 N.E.2d 1119 (1999), as unconstitutional under the Due Process Clause of the XIV Amendment to the Constitution of the United States and appoint temporary justices to sit in the recused Justices stead.

I. It is improper for the Honorable Chief Justice Thomas R. Fitzgerald, the Honorable Justice Charles E. Freeman, the Honorable Justice Robert R. Thomas and the Honorable Justice Anne M. Burke to hear this matter as all Justices or their spouses have received campaign contributions well in excess of $10,000 from Defendants or Defendants' counsel, experts and witnesses.

Pursuant to Supreme Court Rule 63(C), a judge shall disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned. Several Justices currently seated on the Court have received substantial contributions from Defendants or their trial counsel, their experts and their witnesses. These contributions are substantially more than the de mininius interest requiring disqualification pursuant to Rule 63(C)(i)(d),(e)(iii). Specifically, Chief Justice

Thomas R. Fitzgerald has received in excess of $52,000[2] from Defendant Bingle and Defendant Corboy & Demetrio's partners, Philip Corboy, Philip Corboy, Jr., Michael Demetrio and Thomas Demetrio; Justice Charles E. Freeman has received $5,000 from Defendant Bingle and Corboy partner Philip Corboy, Jr.; Justice Robert Thomas has received in excess of $16,000 from Defendant Bingle and the Corboy partners; and while Justice Anne M. Burke has personally received contributions of only $1,500, her husband, Edward M. Burke has received in excess of $24,000 from Corboy partners Thomas Demetrio and Philip Corboy. In addition to these amounts, Defendant's legal experts Robert Clifford of the Clifford Law Offices and Joseph Power of Power Rogers & Smith, P.C. have contributed substantial amounts to the abovementioned Justices including $25,000 to Justice Charles E. Freeman and $17,000 to Justice Robert Thomas.[3]

In addition to the contributions received by the Justices, Justice Robert Thomas recently was awarded $7,000,000 in a defamation lawsuit in which he was represented by Defendants' legal expert Joseph Power of Power Rogers & Smith, P.C. and Justice Thomas Kilbride, who does not appear to have received direct campaign contributions from Defendants, has recently recused himself from several appeals involving product liability due to his pending case involving a bicycle injury. The underlying cases are product liability.

The issue of when campaign contributions raise an issue of bias regarding the judiciary's legitimacy and efficacy which affects the public's confidence in the fairness and fidelity of the law is an issue of first impression for the

Illinois Supreme Court. Currently, as reported on November 17, 2008, this exact issue is pending before the United States Supreme Court in the case Caperton v. Massey Coal Co., No. 08-22. Caperton, certiorari granted on appeal from the West Virginia Supreme Court, involves one West Virginia Supreme Court Justice who was the swing vote in reversing a large jury award against a defendant whose officer and shareholder was a substantial contributor to the Justices' campaign.

The United States Supreme Court has repeatedly referenced the importance of the public's confidence in the fidelity of the law. See, e.g. Alden v. Maine, 527 U.S. 706, 752 (1999) (a state court's "legitimacy derives from fidelity to the law"); Mistretta v. United States, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); Valley Forge Christian College v. Americans United far Separation of Church & State, Inc., 454 U.S. 464, 474 (1982) ("public confidence [is] essential" to the judicial branch) (quoting United States v. Richardson, 418 U.S. 166,188 (1974)(Powell, J., concurring).

Although the percentages contributed by Defendants are significantly less than the 60% claimed in Caperton, the facts underlying the contributions in the instant case are even more compelling to require the recusal of Justice Burke, Justice Roberts, Justice Freeman and Chief Justice Fitzgerald. In Caperton, the contributions were not made directly by the defendant, Massey Coal Co., but rather by a major shareholder and officer of the defendant. In the instant case, the contributions were made directly by Defendants. Furthermore, in

Caperton only one justice of the West Virginia Supreme Court was alleged to have received substantial contributions from the defendant's officer. Thus, the plaintiffs had the ability to win the support of three of the remaining four West Virginia Supreme Court Justices and succeed in their suit. In the instant suit four of the seven Illinois Supreme Court Justices have received contributions or have other relations with Defendants and their experts. Thus, unlike Caperton where, irrespective of the bias of the Chief Justice, the plaintiffs retained a 75% chance of succeeding in their appeal, in the instant suit, to have their Petition for Leave to Appeal granted Plaintiffs must receive four votes, an impossibility with the imbedded bias of four sitting Justices. See Ill. Const. art. VI, § 3.

The substantial financial contributions, well in excess of $100,000 and occasionally approaching 20% of the total contributions, made by Defendants and Justice Thomas' relationship with Defendant's expert, Joseph Power, present grave issues regarding the Justices ability to render an impartial decision in this matter.

With the appearance of impartiality, Plaintiffs respectfully petition Justice Anne M. Burke, Chief Justice Thomas R. Fitzgerald, Justice Charles E. Freeman and Justice Robert R. Thomas to recuse themselves from hearing any arguments or rendering any decision in this matter including, but not limited to, ruling on Plaintiffs' Petition for Leave to Appeal and Plaintiffs' Appeal to the Illinois Supreme Court if Leave to Appeal is allowed.

II. The Supreme Court must reconsider its previous holdings finding itself incapable of appointing or designating by lottery temporary substitute Justices to replace Justices who have recused themselves.

Supreme Court vacancies, although infrequent, do occur and are routinely filled with exceptional lawyers and judges of integrity and intellect. Most recently, Justice Anne Burke was appointed by the Court to fill the unexpired term of the retiring Justice Mary Ann McMorrow. It is respectfully suggested that the Court consider a fair and impartial mechanism to make appointments preserving the seven member panel for its critical consideration of petitioners Petition for Leave to Appeal.

The Supreme Court has twice been asked to interpret Article VI, § 16 of the Illinois Constitution of 1970. In both Perlman v. First Nat'l Bank of Chicago, 60 Ill.2d 529 (1975), and PHL, Inc. v. Pullman Bank & Trust Co., 86100, 721 N.E.2d 1119 (Ill.1999), this Honorable Court has held that it may not temporarily appoint replacement Justices for the Supreme Court when Justices are required to recuse themselves from considering a case. In his dissent in Perlman, Chief Justice Underwood deliberated over several scenarios which might be rectified if the Supreme Court were to interpret Article VI, § 16 to empower the Supreme Court to appoint temporary replacements when the Supreme Court is incapable of reaching the required four votes. Perlman, 60 Ill. 2d at 530. Plaintiffs deplore the forfeiture of just one recusal without replacement and the obvious inequity and injustice it creates.[4]

A scenario much more compelling than those contemplated by the former Chief Justice is presented here. In § I of this motion Plaintiffs have identified four Justices who received substantial campaign contributions from Defendants and their counsel, experts and witnesses and have been represented by Defendants' experts. The recusal of these Justices results in only three Justices competent to consider Plaintiffs' Petition for Leave to Appeal. Unlike Perlman and PHL, where at leas four Justices remained to satisfy the requirements of Article VI, § 3 of the Constitution, in this case even if all non-recused Justices vote to grant Plaintiffs' Petition for Leave to Appeal, Plaintiffs would not obtain the required four votes. This is not only an absurd result, but also a violation of Plaintiffs' Due Process rights under the XIV Amendment of the United States Constitution.

The XIV Amendment of the United States Constitution mandates that individuals receive Due Process rights in dealing with states, The United States Supreme Court has held that a fair trial in a fair tribunal is a basic requirement of due process and that fairness requires an absence of actual bias in the trial of cases. In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623 (1955). In re Murchison, although referring to a criminal trial proceeding, further held, "every procedure which would offer a possible temptation to the average man as a judge ... not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law." Id.

The holding of In re Murchison is relevant to the instant matter. If required to obtain the necessary four votes with less than seven sitting Justices, not only will

Plaintiffs face a drastic diminution of the odds, but will tragically receive no due process when four Justices elect to recuse themselves in compliance with Illinois Supreme Court Rule 63(C). The paradox is exacerbated without the requisite panel of seven; because the individual Justices' abstentions effectively bar Plaintiffs a fair and equitable hearing on their rightful and legitimate Petition for Leave to Appeal.

The present interpretation of Article VI of the Illinois Constitution of 1970 by this Court violates the Due Process clause of the XIV Amendment of the United States Constitution and must be found unconstitutional. Defendants' campaign contributions to the four named Justices effectively purchase Defendants a victory in the Illinois Supreme Court. Four recusals are tantamount to four votes for Defendants. This Court must demonstrate its independence by revisiting its previous decisions as opined in the concurring and dissenting opinions of Perlman and PHL or find that either Article VI, § 3 requiring a quorum and vote of four Justices or Article VI, § 16, limiting the Supreme Court's ability to replace recused Justices, is unconstitutional under the Due Process Clause of the XIV Amendment to the United States Constitution.

We respectfully suggest the court implements the procedure for appointment of Justices upon the resignation or death as most recently employed in the appointment of Justice Anne Burke to replace Justice Mary Ann McMorrow.

WHEREFORE, Plaintiffs respectfully request that pursuant to Supreme Court Rule 63(C), all Justices who have received campaign contributions from Defendants

or their counsel, legal experts or witnesses recuse themselves from deliberating in this matter and that this Honorable Court reconsider its opinions in Perlman and PHL and find that the Illinois Supreme Court has the authority under Article VI, §§ 3, 16 of the Illinois Constitution of 1970 to replace Justices for whom recusal is necessary with suitable temporary appointments in order to guarantee all parties before this Court Equal Protection of the laws and Due Process by having a full seven Justice panel consider Plaintiffs' Petition for Leave and all other matters in the instant appeal.

Footnote

[1]Mr. Corboy, as special counsel to the Illinois Democratic Party, has for years hosted parties to which several members of the Illinois Supreme Court are frequent invitees.

[2]The dollar amount of campaign contributions is derived solely from contributions from Philip Corboy, Philip Corboy, Jr., Tom Demetrio, Michael Demetrio, Robert J. Bingle, Robert Clifford and Joseph Power.

[3]Plaintiffs' counsel, Charles A. "Pat" Boyle, acknowledges he has made contributions to several of the above mentioned Justices, typically $500 or less for benefit dinners and similar fundraising events.

[4]A quorum of less than seven Justices is inequitable. The percentage of the quorum needed to achieve the mandatory four votes granting a Petition for Leave to Appeal disproportionately diminishes when Justices

recuse themselves without appointment of temporary Justices.

> Four mandatory votes out of seven Justices: 57% of the quorum required.
> Four mandatory votes out of six Justices: 67% of the quorum required.
> Four mandatory votes out of five Justices: 80% of the quorum required.
> Four mandatory votes out of four Justices: 100% of the quorum required.
> Any number of justices less than four would render an impossibility of granting motions.

SUPREME COURT OF ILLINOIS

WEDNESDAY, MARCH 25, 2009

THE FOLLOWING CASES ON THE LEAVE TO APPEAL DOCKET WERE DISPOSED OF AS INDICATED:

.....

NO. 107359 - Milvertha Pinnick, etc. et al., petitioners v. Corboy & Demetrio, P.C., etc., et al., respondents. Leave to appeal, Appellate Court, First District. (1-07-0533)

Petition for leave to appeal denied.

October 20, 2008
No. 1-07-0533
FIRST DIVISION

IN THE
APPELLATE COURT OF ILLINOIS FIRST
JUDICIAL DISTRICT

MILVERTHA PINNICK, Guardian and next friend of MANNA PINNICK and CORTLAND PINNICK, minors, and JAMES BRADY, Administrator of the ESTATE OF MELISSA PINNICK, deceased,
Plaintiffs-Appellants,

v.

CORBOY & DEMETRIO, P.C., a Professional Corporation, ROBERT J. BINGLE, individually and as Agent of Carboy & Demetrio, P.C., and G. GRANT DIXON, III, individually and as Agent of Carboy & Demetrio, P.C.,
Defendants-Appellees.

Appeal from the Circuit Court of Cook County.
No. 03 L 8525

Honorable Daniel M. Locallo, Judge Presiding.

Modified Upon Denial of Rehearing

Plaintiffs Milvertha Pinnick, guardian and next friend of Manna Pinnick and Cortland Pinnick, and James Brady, administrator of the estate of Melissa Pinnick, sued defendants Corboy & Demetrio, P.C., Robert J. Single, and Grant Dixon III, alleging legal malpractice,

fraudulent misrepresentation, and negligent spoliation of evidence. The trial court dismissed the fraudulent misrepresentation count and granted summary judgment in favor of defendants on three of the four legal malpractice taunts and the spoliation of evidence count. A $100,000 judgment in favor of the plaintiffs was entered on the remaining legal malpractice claim.

On appeal, plaintiffs contend: (1) the trial court erred when it dismissed their fraudulent concealment claim and denied their motion to amend the complaint to add a cause of action for common law fraud; (2) the trial court erred in holding they could not maintain a separate cause of action for negligent spoliation of evidence and entering summary judgment on the spoliation issue; (3) the trial court erred in granting summary judgment in favor of defendants on plaintiffs' legal malpractice claims arising out of the loss of their product liability and negligent maintenance claims; (4) the trial court erred in limiting plaintiffs' recovery on the remaining legal malpractice claim to $100,000; (5) the trial court erred in denying plaintiffs, motion to add a. prayer for relief for attorneys' fees and costs; (6) the trial court erred in sending a note to Judge Maddux asking him to clarify a prior order; and (7) the trial court erred in denying plaintiffs' motion to compel production of the redacted portions of defendants' case summary in the underlying litigation. We affirm the trial court.

FACTS

The following facts are taken from the pleadings, depositions, affidavits, and exhibits contained in the record on appeal.

In August 1995, Johnny Waites rented a 1994 Mitsubishi Diamante automobile from McFrugal Auto Rental in Atlanta, Georgia. Constance McNair and Melissa Pinnick drove the vehicle from Atlanta to Joliet, Illinois. During the trip to Joliet, Pinnick called Waites to tell him the car had stalled and re-started only after several attempts. Robert Pinnick, Melissa Pinnick's father, attempted to fix the starting problem when McNair and Pinnick reached Joliet, but was unsuccessful.

During the return trip to Atlanta, McNair was driving when she heard a noise, felt the left tire "shift," and lost control of the car. According to McNair, the car completely shut down and the brakes and steering did not work. The car slid across a meridian separating the northbound and southbound lanes of an interstate, coming to rest in the northbound passing lane. McNair was unable to restart the car. A northbound vehicle driven by James Dinsmore struck the car-. Melissa Pinnick, a passenger in McNair's car, was killed in the accident. Two of Pinnick's children were injured. 'McNair claimed she was not asleep, or falling asleep, when the accident occurred.

Robert Pinnick contacted Vincent Cornelius, an attorney and family friend. Cornelius recommended that Corboy & Demetrio represent Pinnick. On August 30, 1995, Cornelius contacted Robert Bingle, Corboy & Demetrio's managing partner. Cornelius told Bingle that McFrugal was attempting to retrieve the rental car, which was being stored in an auto pound in Highland, Indiana.

On September 1, 1995, Bingle met with Robert Pinnick and Cornelius. According to plaintiffs, Bingle told Cornelius and Pinnick: that Corboy & Demetrio would need to get a court order to preserve the car. Following the meeting, Pinnick signed a retainer agreement as the personal representative for the estate of Melissa Pinnick and next friend of Manna. and Cortland Pinnick, Melissa Pinnick's minor children who had been injured in the accident.

Bingle hired Edmund Rooney, a private investigator, to locate the rental car, photograph it, and obtain the police report regarding the accident. On September 2, 1995, Rooney located. the vehicle at Highland Towing in Indiana. on September 12, 1995, Rooney issued his report detailing his investigation. The report said the "contributing circumstance" of the accident was that McNair was apparently- asleep." The report also noted a right rear flat tire, which Rooney did not believe was caused by the. impact of the collision. McFrugal took possession of the car on September 27, 1995. Plaintiffs' complaint alleges the car was subsequently destroyed.[1]

Bingle assigned the case to Grant Dixon, an associate at Corboy & Demetrio. On November 29, 1995, Dixon filed a complaint on behalf of the plaintiffs against Dinsmore in the United States District Court for the Northern District of Indiana. The suit proceeded for three years until, on December 9, 1998, the district court entered a dismissal order, finding plaintiffs' "lengthy pattern of discovery abuses" merited dismissal.

Plaintiffs sued defendants Corboy & Demetrio, P.C., Robert Bingle, and Grant Dixon, alleging spoliation of evidence, four counts of legal malpractice, and

fraudulent concealment. Specifically, Count I of the plaintiffs' third amended complaint alleged the tort of spoliation of evidence arising out of the defendants' failure to preserve the car. Count II alleged legal malpractice arising out of defendants' negligence in plaintiffs' case against Dinsmore. Count III alleged legal malpractice arising out of defendants' failure to sue Mitsubishi, the manufacturer of the rental car. Count IV alleged legal malpractice arising out of defendants' failure to pursue a maintenance case against McFrugal. count V alleged legal malpractice arising out of defendants' failure to sue Goodyear, the manufacturer of the rental car's tires. Count VI alleged fraudulent concealment based on defendants' failure to inform plaintiffs that they had neglected to perform an investigation of the car or its tires for the purpose of pursuing claims against Mitsubishi, 'Goodyear, or McFrugal.

The trial court dismissed the fraudulent concealment count, finding Illinois law did not recognize a claim for fraud separate from a legal malpractice claim. The court also denied Plaintiffs' motion to amend the complaint to add a common law fraud claim and a claim for attorney fees and costs. On January 9, 2007, the trial court granted defendants' summary judgment motion on the spoliation of evidence count. On January 31, 2007, the trial court granted defendants' summary judgment motion on Counts' III, IV, and V, finding plaintiffs could not prove their "case within a case" to substantiate the legal malpractice claims.

With regards to count II, the legal malpractice claim arising out of the case filed against Dinsmore in the Indiana District court, the defendants admitted they

had breached the standard of care in allowing a dismissal to be entered based on discovery violations. The trial court found factual issues remained as to proximate causation and damages. The court granted defendants' motion in limine to cap liability to $100,000, the limit of coverage on Dinsmore's automobile policy. On February 12, 2007, a judgment was entered against defendants on Count II in the sum of $100,000. Plaintiffs appeal.

DECISION

Summary judgment should be granted "without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005 (c) (West 2006) Our standard of review is de novo. Willett v. Cessna Aircraft Co., 366 Ill. App. 3d 360, 368 (2006).

I. Legal Malpractice

We first address the trial court's entry of summary judgment in favor of the defendants on plaintiffs' legal malpractice claims arising out of lost claims against Mitsubishi, McFrugal, and Goodyear. These are Counts III, IV, and V.

The elements of a legal malpractice action are: (1) the existence of an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause; and (4) damages. First

National Bank of LaGrange v. Lowrey, 375 Ill. App. 3d 181, 196 (2007).

"The theory underlying a cause of action for legal malpractice is that the plaintiff client would have been compensated for an injury caused by a third party, absent negligence on the part of the client's attorney." Tri-G, Inc. v. Burke,Bosselman & Weaver, 222 Ill. 2d 218, 226 (2006). To establish proximate cause, the plaintiff must essentially prove a 'case within a case,' that "but for the attorney's negligence, the plaintiff would have prevailed in the underlying action. (Emphasis added.) First National Bank of LaGrange, 375 Ill. App. 3d at 196; Tri-G, Inc., 222 Ill. 2d at 226. Essentially, plaintiffs must establish a prima facie product liability case and then prove it in order to prove the legal malpractice case. She and v. Krol, 218 Ill. App. 3d 254, 257 (1991).

Ordinary negligence principles apply to a legal malpractice action. Lopez v. Clifford Law Offices, P.C., 362 Ill. App. 3d 969, 975 (2005). Although the issue of proximate cause in a negligence action generally is a factual question to be decided by the trier of fact, "it may be determined as a matter of law by the court where the facts as alleged show that the plaintiff would never be entitled to recover." Abrams v. City of Chicago, 211 Ill. 2d 251, 257-58 (2004).

Damages ate not presumed; they must be proved. First National Bank of LaGrange, 375 Ill. App. 3d at 200. Even if negligence on the part of the attorney is established, an action will not lie against the attorney unless that negligence proximately caused the client damage. Metrick v. Chatz, 266 Ill. App. 3d 649, 654

(1994). The plaintiff must prove she suffered actual pecuniary damages as a result of the attorney's. negligence. Tri-G, Inc., 222 Ill. 2d at 226. The existence of actual damages is essential-to a viable legal malpractice cause of action. Palmros v. Barcelona, 284 Ill. App. 3d 642, 646 (1996). No malpractice exists unless counsel's negligence has resulted in the loss of an underlying action. Sheppard, 218 Ill. App. 3d at 257.

Plaintiffs' potential claims against Mitsubishi, McFrugal, and Goodyear constitute the "case within a cases" Plaintiffs must show that had their attorneys pursued the product liability and negligent maintenance claims against those defendants, they would have prevailed in those claims. See Tri-G, Inc., 222 Ill. 2d at 226. For a product liability claim, the plaintiff must allege his injury resulted from an unreasonably dangerous condition of a product, and the condition existed at the time it left the manufacturer's control. Weedon v. Pfizer, Inc., 332 Ill. App. 3d 17, 20 (2002). The elements of a negligent maintenance claim are the same as those for ordinary. negligence: duty, breach, proximate causation, and damages. O'Brien v. City of Chicano, 285 Ill. App. 3d 864, 871 (1996)

Plaintiffs contend, because the defendants are responsible for their inability to prove their "case within a case," this court should shift the burden of persuasion to the defendants. They rely for this assertion on the decision of the California Court of Appeal in Galanek v. Wismar, 68 Cal. App. 4th 1417 (1999).

In Galanek, the plaintiff filed a legal malpractice claim based on negligent spoliation of evidence against her

former attorney. She alleged the attorney's failure to take steps to prevent the destruction of her vehicle caused her to lose a meritorious products liability case against Honda Motor Company, Ltd. (Honda). Galanek, 68 Cal. App. 4th at 1420. Plaintiff's counsel told the court he was unable to prove plaintiff would have prevailed in her product liability case if her vehicle had been preserved. He said without the vehicle, he could not prove the seat was defective. In his opening statement, counsel said the car was defective and said the unavailability of the car resulted in the loss of plaintiff's case against Honda. The trial court granted the defendant's motion for nonsuit based on plaintiff's failure to establish an essential element of her cause of action. Galanek 68 Cal. App. 4th at 1423.

The court of appeal reversed. Galanek, 68 Cal. App. 4th at 1425. The court relied on prior California decisions shifting the burden of proof to the defendant in negligence and products liability cases as public policy demands. Galanek, 68 Cal. App. 4th at 1426. Where " 'the defendant's negligence makes it impossible, as a practical matter, for plaintiff to prove 'proximate causation' conclusively, it is more appropriate to hold the defendant liable than to deny an innocent plaintiff recovery, unless the defendant can prove that his negligence was not a cause of the injury.'" Galanek, 68 Cal. App. 4th at. 1426, quoting Thomas v. Lusk, 27 Cal, App. 4th 1709, 1717 (1994). The court held the facts in plaintiff's opening statement, if proved, war-ranted a shifting of the burden of proof to defendant to establish his negligence did not cause plaintiff to lose a meritorious products liability claim against Honda. Galanek, 68 Cal. App. 4th at 1426, 1428.

We decline to follow Galanek. No Illinois court has accepted the plaintiffs' argument. In Boyd v. Travelers Insurance Co., 166 Ill. 2d 188, 200 (1995), the supreme court majority rejected the dissenting justice's contention that the court should create an evidentiary presumption against defendant Travelers Insurance Co. (Travelers). The dissent argued the court should presume the heater was defective and that defendant's loss of the heater deprived the plaintiffs of their product liability claim against Coleman Company, Inc. (Coleman) The majority held an evidentiary presumption was improper for two reasons. First, if plaintiffs could prove their underlying lawsuit without the missing heater, Travelers' loss of the heater did not cause their injury. Boyd, 166 Ill. 2d at 200. Second, if plaintiffs would have lost their underlying claim even with the missing heater, Travelers did not cause their injury.

166 Ill. 2d at 200.

In another Illinois case, the appellate court held the plaintiff failed to establish a prima facie case of strict liability that was necessary to set forth his legal malpractice claim. Sheppard, 218 Ill. App. 3d at 254. Plaintiff filed a legal malpractice action against his attorney for failing to identify, inspect, and preserve the forklift that caused plaintiff's injury, and failing to institute legal proceedings against the manufacturer or seller of the forklift. Sheppard, 218 Ill. App. 3d at 256. The court held the complaint did not allege specific details to prove plaintiff would have prevailed in his product liability action if his attorney had not been negligent. Sheppard, 218 Ill. App. 3d at 258-59. The complaint did not allege how close defendant was to the

forklift, whether he or someone else was using it before the accident, the type or style of forklift, the forklift manufacturer, any alleged failures by the manufacturer, or any prior difficulties with its operation. Sheppard, 218 Ill. App. 3d at 259.

> "'While it may indeed be possible to introduce sufficient evidence to establish a prima facie case of strict liability even in the absence of the allegedly defective product itself *** plaintiff must present some evidence to raise a material issue as to the absence of abnormal use and the elimination of reasonable secondary causes to prove what condition the product was in when it left [the manufacturer's] control.'" Sheppard 218 Ill. App. 3d at 259, quoting Ralston v. Casanova, 129 Ill. App. 3d 105, 1060 (1984).

The law in Illinois is clear that plaintiffs are required to prove their "case within a case" to establish proximate cause for a legal malpractice action. We will not shift the burden to defendants to prove their negligence did not cause plaintiffs to lose their underlying claims.

Alternatively, plaintiffs contend the evidence supports their "case within a case." Plaintiffs' expert, James I. Scott, a former production engineer for Ford Motor company, testified in his deposition that "it is more probable than not that the vehicle involved in the accident] was experiencing a problem which gas electrical in nature, resulting in the hard starting problem and dead battery caused by the draining of electrical power." He testified a defect in the electrical system of the car caused the accident in this case. His opinion was based on: McNair's testimony that she lost

power prior to the impact; evidence the car would not start after it came to rest; and witnesses' reports that the car had no headlights at the time of impact.

Scott did not stop there. He went on to say: "without the vehicle, it is impossible to make a meaningful determination as to the origin of the failure." He said he could not determine whether the defect was caused by a manufacturing or design flaw, a mechanic's negligence, or misuse of the vehicle. He said he could not foresee that the accident itself would have caused the indicated problems.

Plaintiffs also point to evidence that the car stalled and had to be restarted on the initial trip from Atlanta to Joliet. McNair testified that just before the accident, she heard a noise, felt the left tire "shift," and lost control of the car.

After the car came to rest, the lights were off, the doors would not unlock, and the car would not start. In his report, investigator Edmund J. Rooney noted that in his photographs, the right rear tire was flat, the rubber was "away from the tire itself," and the tire did not "appear to be flat due to the damage or impact."

Although we see merit in plaintiffs' contention their attorneys were negligent in failing to file a protective order to preserve the car, plaintiffs have failed to establish the proximate cause element of their legal malpractice claims. "Where a legal malpractice case involves an underlying cause of action that never reached the trial stage because of alleged negligence on the part of plaintiff's attorney, plaintiff must allege that he had a valid cause of action and must ultimately prove

up his case at trial." Dunavan v. Calandrino, 167 Ill. App. 3d 952, 964-65 (1988). We find plaintiffs have not established they would have prevailed in their product liability and negligent maintenance actions had defendants not been negligent.

II. Spoliation

Plaintiffs contend the trial court erred when it held they cannot maintain a claim for spoliation separate from their legal malpractice claims. This is Count I.

In the Illinois Supreme Court declined to recognize "spoliation of evidence" as an independent tort. Boyd, 166 Ill. 2d at 192-93. Instead, the court held "an action for negligent spoliation can be stated under existing negligence law." Boy 166 Ill. 2d at 193. The elements of a negligent spoliation claim, therefore, are identical to a negligence claim: (1) the existence of a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) proximate cause; and (4) actual damages. Boyd, 166 111. 2d at 194-95.

To establish proximate cause, the plaintiff "must allege sufficient facts to support a claim that the loss or destruction of the evidence caused the plaintiff to be unable to prove an underlying lawsuit." (Emphasis in original.) 166 Ill. 2d at 196. It is not necessary for the plaintiff to establish that, but for the destruction of the evidence, he would have prevailed in the underlying action. The plaintiff need only show that but for the loss or destruction of the evidence, he had a reasonable probability of succeeding in the underlying suit. 166 Ill. 2d at 196, n.2.

While the court in Boyd held spoliation of evidence is not an independent tort with distinct elements, the court clearly held a plaintiff may raise a spoliation claim concurrently with an underlying negligence claim. Boyd, 166 Ill. 2d at 198. Here, the claims underlying the spoliation claim are the legal malpractice claims, which are couched in negligence terms. See Fabricare Equipment Credit Corp. v. Bell, Boyd, & Lloyd, 328 Ill. App. 3 d 784, 788 (2002)(applying negligence elements to a legal malpractice claim).

We disagree with defendants that the spoliation claim was duplicative of, or was subsumed in, the legal malpractice counts. In Madumdar v. Lurie, 274 Ill. App. 3d 267 (1995), relied on by defendants, the plaintiffs sued their former attorneys for legal malpractice under three theories: negligence, breach of contract, and breach of fiduciary duty. The court held the separate counts were duplicative because they were based on the same operative facts resulting in the same injury to the client. The court remanded to the circuit court with directions to strike the complaint and allow the plaintiffs to replead. Malumdar, 274 Ill. App. 3d at 273-74.

In this case, although the spoliation claim and the legal malpractice claims arise from the same set of facts, they require different standards of proof. A plaintiff need only show a reasonable probability of success in the underlying claim to establish proximate cause for a negligent spoliation claim. To establish proximate cause for legal malpractice, however, a plaintiff must plead and prove a "case within a case."

Fabricare, 328 Ill. App. 3d at 788. In other words, the plaintiff must show, but for the attorney's negligence, plaintiff would have been successful in the underlying action. (Emphasis added.) Fabricare, 328 Ill. App. 3d at 788. We find the trial court erred in holding plaintiffs cannot maintain a separate, claim for negligent spoliation of evidence in a complaint for negligent legal malpractice.

We next consider the decision to grant summary judgment to defendants on Count I. Defendants contend plaintiffs failed to allege facts supporting a duty to preserve the evidence. Although there is no general duty to preserve evidence, a duty may arise through an agreement, a contract, a statute, or other special circumstance. Boyd, 166 Ill. 2d at 195. A defendant also may voluntarily assume a duty through affirmative conduct. If any of these circumstances exist, "the defendant owes a duty of care to preserve evidence if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." Boyd, 166 Ill. 2d at 195. If the plaintiff does not satisfy both the relationship and foreseeability prongs, there is no duty to preserve the evidence. Dardeen v. Kuehling, 213 Ill. 2d 329, 336 (2004).

Plaintiffs contend defendants' duty arose from the parties' contract, or, alternatively, from the defendants' affirmative conduct. First, the contingency agreements required defendants to represent plaintiffs in the "settlement, adjustment, or, prosecution of a cause of action for wrongful death against persons or entities responsible out of an occurrence on the 17th day of August, 1995." Plaintiffs' experts 'testified the

agreements gave rise to a duty to file a protective order to secure the car. Second, plaintiffs contend the defendants voluntarily assumed a duty to preserve the evidence. They rely on Bingle's statement to Cornelius and Robert Pinnick "that the Firm would need to get a court order to preserve the car and that the Firm would have `someone *** to investigate the vehicle. Defendants contend they had no duty to preserve the vehicle because they never possessed or controlled it. The vehicle belonged to McFrugal and was physically located at the premises of Highland Towing.

In Dardeen, plaintiff James Dardeen fell in a hole on a sidewalk outside defendant Alice Kuehling's house. Dardeen, 213 Ill. 2d at 331. Kuehling asked her insurance agent if it would be alright to remove the damaged bricks from the sidewalk; the agent said yes. No photographs of the hole were taken. Dardeen raised negligent spoliation of evidence claims against Kuehling and State Farm Insurance Company (State Farm) Dardeen alleged State Farm had a duty to preserve the damaged sidewalk once its agent was informed of the accident. Dardeen, 213 Ill. 2d at 332. The court held State Farm had no duty to preserve the evidence, Dardeen never requested that State Farm preserve the sidewalk or document its condition. Additionally, "State Farm never possessed the evidence at issue and, thus, never segregated it for the plaintiff's benefit." Dardeen, 213 Ill. 2d at 338. The court said:

> "[N]o Illinois court has held that a mere opportunity to exercise control over the evidence at issue is sufficient to meet the relationship prong. [Citations]. We do not intimate that, nor do we decide whether,

> possession is required in every negligent spoliation case. But, in order to avoid summary judgment, Dardeen needed to show something more than State Farm's agent answering affirmatively to Kuehling's question whether she could remove the raised bricks. The record here indicates that State Farm had neither possession nor control over Kuehling's sidewalk and, therefore, owed Dardeen no duty to preserve it." Dardeen, 213 Ill. 2d at 339.

See also 166 Ill. 2d at 195 (plaintiffs' complaint pled a duty to preserve plaintiffs' property and a breach of that duty where Travelers Insurance Company took possession of defective heater and lost the heater).

Plaintiffs contend possession of the car is not a prerequisite to a duty to preserve the evidence. They rely on the court's holding in Jones v. O'Brien Tire & Batter service Center Inc., 374 Ill. App. 3d 918, 921 (2007).

In Jones, Wesley Lowery, an employee of Sugarloaf Landscape Nursery, brought a company-owned truck to O'Brien Tire to have the tires inspected. Four rear tires and two left rear wheels were replaced. Subsequently, the truck was involved in an accident wherein the left rear wheel assembly came off the truck and struck another car, killing the driver. Sugarloaf's insurer, country Mutual, inspected the truck and wheels and instructed Sugarloaf to keep the wheels and not to repair the truck. According to Dave Macios, Sugarloafs owner, a Country Mutual claims adjuster later told him he could have the truck repaired and did not explicitly tell him not to discard the wheels. Macios

had the truck repaired; the left rear wheel was discarded. Jones, 374 Ill. App. 3d at 923. O'Brien Tire and its insurer filed a claim against Country Mutual and Macics for negligent spoliation of evidence. At trial, the jury returned a verdict in favor of the plaintiffs. Country Mutual appealed. Jones, 374 Ill. App. 3d at 924.

On the issue of duty, the court defined the issue as whether Country Mutual assumed a duty to preserve evidence through its actions. It found Country Mutual had "at least enough control over the wheels to be able to fulfill an obligation to preserve them as evidence." Jones, 374 ill. App. 3d at 927. The court said, "while it is certainly true that Country Mutual did not have the kind of complete control over the wheels that it would have had if it had taken possession of them, it had--and exercised--the authority to direct Matzos, as its insured, to preserve the wheels." Jones, 374 Iil. App. 3d at 927.

The court held Country Mutual voluntarily undertook to preserve the wheels when it instructed Macios to keep them. "Once Country Mutual undertook to preserve the evidence for its own benefit, this voluntary undertaking imposed a duty to continue to exercise due care to preserve the evidence for the benefit of any other potential litigants." Jones, 374 Ill. App. 3d at 927. As to the second Bond prong, the court held a reasonable claims adjustor would have anticipated the wheels and tires would be critical evidence in future litigation and had a duty to exercise reasonable care to preserve them. Jones, 374 Ill. APP. 3d at 928.

Unlike Jones, the defendants in this case never took an affirmative action to preserve the car. They did not file a protective order or ask the possessor of the car to preserve it. Neither the plaintiffs nor the defendants possessed the car following the accident. It is not clear whether Bingle's alleged statement "that the Firm would need to get a court order to preserve the car and that the Firm would have 'someone *** to investigate the vehicle' "evinces a clear intent to preserve the vehicle. Cornelius testified he did not recall Bingle's exact words. Single testified he was merely considering the possibility of a protective order. Even accepting Bingle's statement as true, the parties agree defendants never possessed the car. We fail to understand why the defendants would not have attempted to preserve the vehicle by filing a protective order. Nevertheless, based on the court's holdings in Jones and Dardeen, we find defendants did not have the requisite possession or control over the vehicle to establish a duty to preserve it. See Dardeen, 213 Ill. 2d at 339; Jones, 374 Ill. App; 3d at 928.

Nor does the contract between the parties clearly establish a duty to preserve the vehicle. The contingency agreements provide defendants would represent plaintiffs in the "settlement, adjustment, or prosecution of a cause of action for wrongful death against persons or entities responsible out of an occurrence on the 17th day of August, 1995." The agreements do not specifically require the defendants to preserve the evidence. Plaintiffs rely on their experts' testimony that the agreements gave rise to a duty to file a protective order to secure the car. The existence of a duty under the contingency contracts is a question of law, however. See William Blair and

Company, LLC v. FI Liquidation Corp., 358 Ill. App. 3d 324, 339 (2005); Zakoff v. Chicago Transit Authority, 336 Ill. App. 3d 415, 421 (2002). Because construction and interpretation of a contract is a question of law for the court to determine, expert testimony is irrelevant. William Blair and Company, LLC 358 Ill. App. 3d at 339. Although plaintiffs contend they may offer expert testimony on the scope of a lawyer's duty to his client, that applies solely to legal malpractice cases, not spoliation of evidence claims, See First National Bank of LaGrange v. Lowry, 375 Ill. App. 3d 181, 196 (2007).

Even if the defendants had a duty to preserve the evidence and negligently failed to do so, plaintiffs' spoliation claim would fail because they cannot show a reasonable probability of success in the underlying claims. As in the legal malpractice discussion above, plaintiffs do not present sufficient evidence to show a reasonable probability they would have succeeded in their product liability and negligent maintenance claims.

Plaintiffs rely on our supreme court's holding in Tweed Wriaht Ford Sales, Inc., 64 Ill. 2d 570 (1976). There, the plaintiff alleged at trial that the brake system on a Ford vehicle failed as he was attempting to slow down at an intersection, causing an accident. The plaintiff offered no expert testimony concerning the presence of a defect in the automobile's breaking system. The defendant contended on appeal that the plaintiff failed to prove the automobile was defective at the time the accident occurred. The court held a "prima facie case that a product was defective and that the defect existed when it left the manufacture's control is made by proof that in the absence of abnormal use or reasonable secondary

causes the product failed `to perform in the manner reasonably to be expected in light of (its) nature and intended function.'" Tweedy, 64 Ill. 2d at 574, quoting 51 A.L.R.3d 8 (1973). Because the plaintiff was driving carefully at a reasonable rate of speed, the weather was good, the roads were dry, he knew the intersection well, and there was "no evidence of any reasonable secondary cause," the court upheld the jury's verdict. Tweedy, 64 Ill. 2d at 574-75.

Unlike Tweedy, plaintiffs', expert in this case testified that "without the vehicle, it is impossible to make a meaningful determination as to the origin of the failure. He was unable to say the defect was caused by the manufacturer of the car or tires or by the rental agency. We are unable to say there was "no evidence of any reasonable secondary cause" of the accident in this case. See Tweedy, 64 Ill. 2d at 575.

III. Fraud Claims

Plaintiffs contend the trial court erred when it dismissed plaintiffs' claim for fraudulent concealment because the facts of this case clearly sustain a cause of action for fraud. This is Count VI. Plaintiffs also contend the trial court erred when it denied their motion to amend the third amended complaint to add a cause of action for common law fraud and to set a hearing on punitive damages. We disagree.

A section 2-615 motion to dismiss challenges the legal sufficiency of the complaint based on defects apparent on its face. 735 ILLS 5/2-615 (West 2004). In order for a complaint to be considered legally sufficient, it must set forth a legally recognizable claim "upon which relief can

be granted." Winfrey v. Chicago Park District, 274 Ill, App. 3d 939, 943 (1995). If the complaint fails to do so, there is no recourse at law for the injury alleged, and the complaint must be dismissed. Winfrey, 274 Ill. App. 3d at 943. We review a circuit court's grant of a section 2-615 motion to dismiss de novo. Marshall v. Burger King Corp., 222 Ill. 2d 422, 429 (2006)

Whether to grant a motion to amend pleadings rests within the discretion of the trial court and will not be reversed absent an abuse of that discretion. Cangemi v. Advocate South Suburban Hospital, 364 Ill. App. 3d 446, 467 (2006). In determining whether a trial court abused its discretion, courts consider:

> "'(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleadings could be identified.'" Cangemi, 364 Ill. App. 3d at 467, quoting Loyola Academy v. S & S Roof Maintenance, Inc., 146 Ill. 2d 263, 273 (1992)

A proposed amendment must satisfy all four Loyola Academy factors; however," 'if [a] proposed amendment does not state a cognizable claim, and thus, fails the first factor, courts of review will often not proceed with further analysis." Cangemi, 364 Ill. App. 3d at 467, quoting Hayes Mechanical, Inc. v. First Industrial, L.P.., 351 Ill. App. 3d 1, 7 (2004).

Section 2-1115 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1115 (West 2004)) provides that "[i]n all

cases, whether in tort, contract or otherwise, in which the plaintiff seeks damaged by reason of legal, medical, hospital, or other healing art malpractice, no punitive, exemplary, vindictive or aggravated damages shall be allowed." Despite section 2-1115's sweeping prohibition against punitive damages in legal malpractice cases, Illinois courts have recognized section 2-1115 does not apply to complaints alleging common law fraud. See Kennedy v. Grimsley, 361 Ill. App. 3d 511, 513 (2005); Cripe v. Leiter, 291 Ill. App. 3d 155 (1997).

To state a claim for fraudulent concealment, a plaintiff must prove: (1) a false statement of material fact; (2) that the party making the statement knew it was false or believed it to be untrue; (3) the party to whom the statement was made had a right to rely on the statement and did, in fact, rely on it; (4) the statement was made for the purpose of inducing the other party to act; and (5) that reliance by the person to whom the statement was made led to his injury. Stewart v. Thrasher, 242 Ill. App. 3d 10, 15-16 (1993).

In order to sustain a cause of action for common-law fraud, the plaintiff must prove "that the defendants intentionally made a false statement of material fact or failed to disclose a material fact, that the plaintiff had a tight to rely on the false statement or omission, that the statement or omission was made for the purpose of inducing reliance thereon, the plaintiff, in fact, relied on the statement or omission, and the plaintiff suffered injury as a direct result." Fox v. Heimann, 375 Ill. App. 3d 35, 47 (2007) ; Los Amigos Supermarket, Inc. v. Metropolitan Bank and Trust Co., 306 Ill. App. 3d 115, 127 (1999). The defendants' knowledge of the falsity of the statement, or a deliberate concealment with the

intent to deceive, is an essential element of common-law fraud. Fox, 375 Ill. App. 3d at 47. Common law fraud must be proved by clear and convincing evidence. Fox, 375 Ill. App. 3d at 47.

A plaintiff cannot avoid the effect of section 2-1115, however, by simply applying a fraud label to legal malpractice claims. Kennedy, 361 Ill. App. 3d at 514. "In determining the applicability of section 2-1115, the court must look to the 'nature of the behavior alleged' in plaintiff's complaint to 'determine whether the activities fell within the term 'legal malpractice.'" "Brush v. Gilsdorf, 335 Ill. App. 3d 356, 360 (2002), quoting Safeway Insurance Co. v. Spinak, 267 Ill. App. 3d 513, 518 (1994).

In Cripe, the plaintiff alleged she received several billing statements in which the defendants made false statements with regard to the number of hours spent representing the plaintiff in a trust and guardianship case. The defendants argued that since an attorney must exercise professional judgment to determine what fee is appropriate, the alleged fraud amounted to malpractice. The court held legal malpractice and common law fraud are distinct causes of action. See Cripe, 291 Ill. App. 3d at 158. The court rejected the premise that any fraudulent act committed by an attorney merely amounts to malpractice. See,Cripe, 291 Ill. App. 3d at 159.

In Kennedy, the plaintiff alleged the defendant committed legal malpractice and fraud by failing to file a medical malpractice lawsuit prior to the expiration of the statute of limitations. In addition to the legal malpractice claim, Count III of the plaintiff's complaint

alleged common law fraud. The plaintiff alleged that at an initial meeting with the defendant, the defendant told the plaintiff she was "well familiar" with handling medical negligence cases and the principles governing such cases in the State of California. The plaintiff asserted the defendant in fact had no prior experience in medical negligence cases, and had no knowledge of California law. The plaintiff alleged the statements were made with the intent to deceive the plaintiff and induce her to enter into an attorney client relationship.

The court found the "gravamen of plaintiff's claim is one for legal malpractice, not fraud."Kennedy, 361 Ill. App. 3d at 514. The nature of the behavior alleged concerned the defendant's actions and statements in the creation of the attorney-client relationship, the necessary predicate to any malpractice action. Kennedy,361 Ill. App. 3d at 514. The court held the plaintiff's attempt to carve out a separate cause of action. was understandable in light of section 2-1115; however, it created an "artificial distinction between the formation of the attorney-client relationship and its consequences." Kennedy, 361 Ill. App. 3d at 514. The court found that:

> "The essence of plaintiff's claim is that the relationship with defendant caused her harm, due to a lack of skill, knowledge or effort. Plaintiff's allegations that defendant misled her about that lack of skill or knowledge are so inextricably intertwined with her claims for legal malpractice that they cannot escape the effect of section 2-1115. Unlike the fraudulent billing at issue in Gripe, which was unrelated to issues of legal skill and ability, plaintiff's allegations of

> defendant's lack of knowledge and ability are precisely those underlying her malpractice suit." Kenn 351 Ill. App. 3d at 514.

Here, similar to Kennedy, the focus of plaintiffs' allegations lies in legal malpractice, not fraud. Both Count VI of plaintiffs' third amended complaint and their proposed common law fraud amendment alleged that after defendants said they would conduct a thorough investigation of the car and take the necessary steps to secure and preserve the vehicle, they failed to inspect the vehicle, informed Vincent Cornelius that Corboy & Demetrio had experts evaluate the vehicle, and informed Cornelius that Corboy & Demetrio had fully investigated the products liability and maintenance claims. Plaintiffs alleged the true facts--that the car was lost, destroyed, and never inspected by experts--were concealed with the intent to deceive plaintiffs into believing defendants had thoroughly investigated the vehicle and tires.

The same allegations form the crux of plaintiffs' legal malpractice claims. Counts III, IV, and V relied on defendants' failure to advise or inform plaintiffs of their failure to investigate whether the subject vehicle caused or contributed to the crash as proof that defendants breached their duties. Counts III, IV, and V also specifically alleged defendants committed legal.malpractice by advising plaintiffs that an investigation of the vehicle had revealed no defect when in fact no investigation had ever been undertaken. Both the legal malpractice and fraud claims center on Single's alleged statement when entering into an attorney-client relationship with the plaintiffs "that the Firm would need to get a court

order to preserve the car and that the Firm would have 'someone *** to investigate the vehicle." In light of the pleadings before us, we find plaintiffs' allegations that defendant fraudulently misled them regarding the investigation of the car are "inextricably intertwined" with their claims for legal malpractice. See Kennedy 361 Ill. App. 3d at 514.

Moreover, even if we were to find plaintiffs' fraud claims amounted to separate actions, we find plaintiffs are unable to establish they were actually injured by defendants' allegedly fraudulent conduct. Courts have consistently and emphatically held that a plaintiff's injuries in fraud actions "must directly and proximately result from defendants' misrepresentations and cannot be assessed upon mere speculation or hypothetical assumptions." State Security Insurance Co. v. Frank B. Hall & Co., 258 I11. App. 3d 588, 592 (1994). Proof of injury is a an essential element of fraud. State Security Insurance, Co., 258 Ill. App. 3d at 592-93.

Although plaintiffs alleged they were injured because they were unable to pursue product liability and negligent maintenance claims in the underlying litigation, nothing in the pleadings indicates the claims would actually have been successful. As in the legal malpractice discussion above, plaintiffs failed to present sufficient evidence to establish they probably would have succeeded in their product liability and negligent maintenance claims. While plaintiffs' expert opined that a defect was the likely cause of the car crash, he was unable to pinpoint the origin of the car's defect. He was unable to say whether the defect was ultimately caused by the car manufacturer, the tire manufacturer, or the rental agency. Because plaintiffs allegations are based

merely upon "speculation or hypothetical assumptions" that their product liability and negligent maintenance actions would have succeeded, we find the plaintiffs are unable to show a concrete injury as a result of defendants' allegedly fraudulent conduct. See State Security Insurance Co., 258 Ill. App. 3d at 592.

The trial court properly dismissed Count VI of plaintiffs' third amended complaint. The trial court did not abuse its discretion in denying the proposed common law fraud amendment.

IV. Liability Cap

Plaintiffs contend the trial court erred in limiting plaintiffs' recovery to $100,000 on Count II of the third amended complaint.

Count II alleged legal malpractice based on defendants' failure to comply with a discovery order, which resulted in plaintiffs' underlying suit against Dinsmore in federal court being dismissed. Defendants admitted the dismissal of the underlying action was a breach of their duties. At issue was proximate causation and damages. With regard to damages, defendants filed a motion in limine to bar evidence of collectibility beyond Dinsmore's $100,000, the limit of Dinsmore's automobile insurance liability policy. Defendants contended plaintiffs had not disclosed any evidence of Dinsmore's assets, nor had they disclosed him as a fact witness. Defendants contended the only evidence of collectibility was the $100,000 policy. The trial court agreed, granting defendants' motion in limine and entering judgment in favor of plaintiffs in the amount of $100,000.

Illinois continues to require legal malpractice plaintiffs to plead and prove the solvency of the defendant in the underlying, claim. Visvardis v. Ferlecfer, 375 Ill. App. 3d 719, 726 (2007); Sheppard v. Krol, 218Ill. App. 3d 254, 259 (1991) Goldzier v. Poole, 82 Ill. App. 469, 471 (1898). The plaintiff must "plead facts supporting an inference that after the date of the malpractice, and some time before the judgment against the underlying defendant would become unenforceable due to age, the underlying defendant would have some funds available for payment of some part of the damages." Visvardis, 375 Ill. App. 3d at 726.

In Bloome v. Wiseman, 279 Ill. App. 3d 469, 478 (1996), the court rioted collectibility "should not, and must not, be equated with solvency." The court held that to require evidence of total collectibility would inject elements of proof into legal malpractice trials that are neither relevant nor necessary, unnecessarily complicating and lengthening the trial. Bloome, 279 Ill. App. 3d at 478. Our supreme court has continued to recognize, however, that a plaintiff's damages in a malpractice suit are "limited to the actual amount the plaintiff would have recovered had he been successful in the underlying case." Eastman v. Messner, 188 Ill. 2d 404, 412 (1999).

In this case, plaintiffs failed to allege any facts in their complaint to support Dinsmore's solvency. The only indication Dinsmore would be able to pay an underlying judgment was the $100,000 automobile liability policy disclosed during discovery. As the trial court noted in granting defendants' motion in limine, no other evidence had been produced in discovery that would have allowed the circuit court to consider a higher

figure. We find the trial court did not abuse its discretion in capping defendants' liability on Count II at $100,000.

V. Attorney Fees and costs

Plaintiffs challenge the trial court's denial of their motion to add a prayer for relief for attorney fees and costs. They contend the fees were incurred to "rectify a wrong" committed by defendants, i.e., fraud, spoliation of evidence/ and legal malpractice.
They cite Sorenson v. Fio Rito, 90 Ill. App. 3d 368, 372 (1980), where the court held a plaintiff may recover losses, including attorney fees, that are directly caused by the defendant's misconduct. The Sorenson court acknowledged Illinois has adopted the "American Rule," precluding attorney fees where a successful litigant seeks to recover his costs in maintaining his lawsuit. See Duignan v. Lincoln Towers Insurance Agency, Inc.,
282 Ill. App. 3d 262 (1996) (Generally, a successful litigant may not recover litigation expenses in the absence of a statute or contractual agreement allowing recovery of expenses.) The court held the plaintiff could request the attorney fees he incurred in attempting to obtain refunds of tax penalties assessed against the plaintiff solely as a result of the defendant's negligence. Sorenson, 90 Ill. App. 3d at 372. Those fees were expended in a proceeding separate from the litigation between the parties. Attorney fees, "at least to the extent that they were not incurred in the same action in which they are awarded," may be recovered where the defendant's tortious conduct caused the plaintiff to incur them. Calcagno v. Personalcare Health Management, Inc., 207 Ill. App. 3d 493, 506 (1991).

Unlike the plaintiff in Sorenson, the plaintiffs in this case seek reimbursement for the attorney fees they expended in bringing the lawsuit against the defendants. This issue falls squarely within the American Rule and precludes plaintiffs' request. Plaintiffs say in their brief: "To the extent Illinois law prevents the recovery of fees in this situation ***, the law should be changed to achieve a more equitable result." They do not argue this point in further detail nor do they cite any additional authority. We do not consider plaintiffs' argument. Contentions unsupported by citation of authority fail to meet the requirements of supreme court Rule 341(h)(7), 210 Ill. 2d R. 341 (h)(7), and may be forfeited. Elder v. Bryant, 324 Ill. App. 3d 526, 533 (2001).

VI. Trial Court's Clarification of Interlocutory Order

Plaintiffs contend Judge Locallo erred by sending a note to Judge Maddux asking him to clarify his January 31, 2007, order. The original order states: "With regard to Count II, [defendants] have admitted professional negligence concerning the underlying action against James Dinsmore. However, factual issues as to damages in Count II remain to be determined by the trial court." In response to a note asking for clarification, Judge Maddux entered an order stating, in part, "Plaintiffs still have the burden of establishing proximate causation and damages.

We cannot discern what injury plaintiffs are hoping to redress by inclusion of this issue in their appeal. Plaintiffs were successful in their legal malpractice claim based on the underlying negligence claim against Dinsmore and McNair. On February 12, 2007, Judge

Locallo entered judgment for the plaintiffs on Count II of their complaint.

Generally, a party "'who has obtained by judgment all that has been asked for in the trial court cannot appeal from the judgment,'" Illinois Central R.R. Co. v. Accident and Casualty Co. of Winterthur, 317 Ill. App. 3d 737, 743 (2000), quoting Material Service Corp. v. Department of Revenue, 98 Ill. 2d 382, 386 (1983). "Even though a successful party may not agree with the reasons, conclusions or findings of the lower court, it is improper to provide that successful party with a forum in a reviewing court." Illinois Central R.R. Co., 317 Ill. App. 3d at 743. Plaintiffs, having been successful on Count II, have no basis to appeal the wording of the trial court's orders leading to the judgment on Count II.

VII. Motion to Compel

Plaintiffs contend the trial court erred in denying their motion to compel production of defendants' unredacted case summary of the underlying case. Plaintiffs contend that if defendants believed they were making privileged communications in, the case summary that plaintiffs were not entitled to see, the defendants should have abided by Rule 1.15(a) of the Illinois Rules of Professional Conduct and kept the privileged communications separate from the underlying case file, which was the plaintiffs' "property." Because defendants failed to do so, plaintiffs contend defendants waived their right to claim privilege with respect to any portion of the file.

The record reflects defendants maintained a "case summary" while representing the plaintiffs in the underlying litigation, which contained their notes, mental impressions, and summaries of evidence regarding the underlying action. The defendants produced the case summary in June 2000 with allegedly confidential notes redacted. Plaintiffs moved to compel production of the entire, unredacted summary. In response, defendants contended the confidential notes consisted of internal notes regarding the legal malpractice claim and confidential communications between the defendants and their malpractice counsel and insurer, which were protected by Supreme Court Rule 201(b)(2) (166 Ill. 2d. R. 201). Following briefing and an incamera review, the trial court found the redacted portions of the summary were privileged and denied plaintiffs' motion.

Rule 201(b) (2) provides that;

> "All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure. Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose theories, mental impressions, or litigation plans of the party's attorney." (Emphasis added.) 210 Ill. 2d R. 201(b)(2).

Plaintiffs have failed to cite a single instance where an otherwise protected document under Rule 201(b)(2) was rendered discoverable because it was commingled

with another party's "property." While Rule 1.15 is clearly binding on an attorney, "it is not binding authority on a trial court." See People v. Howard, 376 Ill. App. 3d 322, 339-40 (2007). In addition, we have examined the defendants' entire Case Summary. We find nothing in it that would be of assistance to the plaintiffs. We see no reason to disturb the trial court's finding that the redacted portions of the case summary were privileged.

CONCLUSION

We affirm the trial court's judgments.
Affirmed.

Wolfson, J., with R. Gordon, P.J., and Garcia, J., concurring.

Footnote

[1]Plaintiffs ask us to take judicial notice of an attachment to their reply brief indicating a salvage title was issued for the automobile in Florida on January 25, 1996, a prerequisite before an automobile may be destroyed under Florida Statute 319.30(3)(b). We will not consider facts which were not part of the trial court record. Rosengard v. McDonald, 205 Ill. App. 3d 208, 212 (1990)

Entered: 10/7/2008
No. 1-07-0533

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MILVERTHA PINNICK, Guardian and next friend of MANNA PINNICK and CORTLAND PINNICK, minors, and JAMES BRADY, Administrator of the ESTATE OF MELISSA PINNICK, deceased,
Plaintiffs-Appellants,

v.

CORBOY & DEMETRIO, P.C., a Professional Corporation, ROBERT J. BINGLE, individually and as Agent of Carboy-& Demetrio, P.C., and G. GRANT DIXON, III, individually and as Agent of Carboy & Demetrio, P.C.,
Defendants-Appellees.

ORDER

This Court, having considered Plaintiffs-Appellants' Petition for Rehearing, Defendants-Appellees' Response to the Petition for Rehearing, and Plaintiffs-Appellants' Reply in Support of Petition for Rehearing, hereby denies the Petition for Rehearing.

A Modified Rule 23 Order upon Denial of Rehearing will be filed in due course.